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CONVEYANCER'S NOTEBOOK

Crown Lessees (Protection of Sub-Tenants) Act, 1952.—The Rent Restrictions Acts do not bind the Crown and this exemption has given rise to a fortuitous privilege : a lessee from the Crown was himself free from the burdens of the Acts in relation to a sub-letting by him (*Rudler* v. *Franks* (1947) 63 T.L.R. 109). The Crown Lessees (Protection of Sub-Tenants) Act, 1952, which came into operation on September 1, has removed this anomaly, but without affecting the rights of the Crown itself. It provides that the mere fact that there exists or existed in land an interest vested in the Crown or a Government Department shall not prevent the Rent Control Acts from applying to such land, but the Acts do not apply as between the Crown or a Government Department as landlord, lessor or mortgagee and its immediate tenant, lessee or mortgagor. Dwelling-houses affected by the Act came within the control of the Rent Restrictions Act, 1939; February 8, 1952, is substituted for September 1, 1939, as the critical date. The standard rent is accordingly determined by the rent at which the premises were let on February 8, 1952, or, if not then let, by the rent at which they were last let before then; if first let after February 8, 1952, the first letting will fix the standard rent. As the dwelling-houses affected by the 1952 Act are subject to the 1939 Act control the permitted increases are limited to those allowed by the 1939 Act.

The 1952 Act refers to the "Rent Control Acts" and these are defined as the Rent Restrictions Acts, 1920 to 1939, the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949. Accordingly, where the letting which prima facie determines the standard rent began

after September 1, 1939, the standard rent may be varied under section 1 of the 1949 Act. The provisions of sections 2 and 12 of the 1949 Act which prohibit the taking of premiums on the grant or assignment of a tenancy do not affect the payment of any premium required under an agreement made before February 8, 1952; and there is a consequential adaptation of the provision enabling a tenant who has lawfully paid a premium to obtain a proportion of that premium when he assigns.

Housing Act, 1952.—The Housing Act, 1952, which received the Royal Assent on August 1, is an outstanding example of legislation by reference. To understand sections 2 and 3 of the Act (which has only seven sections in all) one has to have available five other Acts—quite apart from the references to the Rent Restrictions Acts and the Land Charges Act, 1925. Section 2 amends the provisions of section 3 of the Housing (Financial Provisions) Act, 1938, dealing with the annual grants which may be made to owners of housing accommodation provided for the benefit of members of the agricultural population. The qualifying conditions for such grants were amended by section 13 (2) of the Housing (Financial and Miscellaneous Provisions) Act, 1946, which added the condition that the house had to be occupied by the owner or the tenant throughout the year. This condition now ceases to have effect, so that a house occupied under a contract of service by a member of the agricultural population now qualifies for a grant. In such a case the grant is only payable if the occupier is permitted to occupy the house free of charge for four weeks if his service is determined during the year in respect of which the grant is claimed. Section 2 of the 1952 Act goes on to provide that an improvement grant may be payable under section 20 of the Housing Act, 1949, if the house is occupied by a member of the agricultural community in pursuance of a contract of service. The latter section enables local authorities to make grants to private persons for the provision of dwellings by means of conversion of houses or other buildings or by improvements of existing dwellings. Such grants were formerly only payable if the premises were occupied by the owner or let or kept available for letting at a rent not exceeding a maximum approved by the local authority. Where the house is occupied by an agricultural worker the grant is subject to the same condition of four weeks' rent-free occupation as in the case of grants under section 3 of the 1938 Act.

Section 3 of the 1952 Act amends the provisions of section 79 of the Housing Act, 1936, which authorises a local authority with the

consent of the Minister to dispose of its houses by sale or lease. Subsection (3) of the latter section provided that the local authority was to obtain the best price or best rent. This provision now ceases to have effect and the Minister may lay down conditions as to the price or rent. When the local authority sells they may, and shall if the Minister so directs, impose conditions, which are valid for five years, limiting the price or rent at which the buyer (or subsequent owner) may sell or let and reserving a right of pre-emption in favour of the local authority. Any such condition, by section 4 (3), must be registered under the Land Charges Act, 1925. This subsection is not too clear, for it provides for registration as a local land charge "but without prejudice to the registration under section 10 of [the Land Charges Act] of any condition being an estate contract." In view of section 21 of the Land Charges Act, 1925, it does not seem to matter whether the right of pre-emption is registered as an estate contract or as a local land charge. Section 3 of the 1952 Act makes a number of minor amendments, one of which at least is far from clear, to section 79 of the Housing Act, 1936.

Powers of Trustees for Sale.—The narrow scope of the somewhat controversial decision in *Re Power* [1947] Ch. 572 may not have been generally recognised. The testator's residuary estate was conveyed to the Public Trustee on trust for sale, the proceeds to be held on trust for his wife for life, remainder to his children and issue. Clause 8 of the will contained a wide investment clause which authorised (inter alia) the purchase of freehold property in England and Wales. The testator's widow, as tenant for life, requested the trustee to apply part of the trust fund in the purchase of a freehold house with vacant possession for her residence. Jenkins J. held that the purchase of freehold land for some purpose other than the receipt of income was not an investment, and accordingly the trustee had no power to do what the tenant for life desired. It is important to notice the terms in which the question in the summons was raised. It was, whether the Public Trustee had power to purchase a freehold residence in England or Wales, not as an investment, but with vacant possession for the occupation of the tenant for life as a home for herself during her life or any less period, and upon the terms of her paying all the outgoings and keeping the premises in repair and insured. The question, therefore, was not directed to any particular purchase, but was in quite general terms. Bearing this in mind, the decision, with respect, may be regarded as correct.

Trustees for sale who wish to apply part of the trust fund in the purchase of a house for the tenant for life need not, however, feel that their cause is hopeless, for if they proceed in a slightly different way, the desired object may be attained. This was in fact done, successfully, in a recent case before a judge sitting in chambers. The question asked in the summons should be whether the trustees are at liberty to purchase a specified freehold house at a price to be fixed on a valuation, which they consider to be a proper investment (the house being conveyed to them on trust for sale) and to permit the tenant for life to occupy the said house, on his undertaking to pay all the outgoings, and to give vacant possession to the trustees on, say, three months' notice in writing requiring him to do so.

This latter provision is designed to meet the objection of the learned judge in *Re Power* that the purchase by the trustees of a house with vacant possession might not be a purchase by way of investment inasmuch as part of the purchase-money would or might be paid for the advantage of vacant possession, an advantage which would be lost as soon as the tenant for life went into occupation. A tenancy would serve the purpose equally well, but in order to avoid any danger of a protected tenancy under the Rent Restriction Acts, a licence is to be preferred.

It may be added that if the trustees no longer hold any land on trust for sale (or where, for example, the tenant for life requires the trustees to purchase a different house from that in which he is living, and this, owing to the smallness of the residuary estate, can only be done by selling the present house) there can be no question of the trustees exercising the powers of a tenant for life in accordance with section 28 of the Law of Property Act, 1925, because they are no longer " trustees for sale " within the meaning of the section (*Re Wakeman* [1945] Ch. 177). In this case, the trustees will rely solely upon the investment clause in the will. If this is not drafted in sufficiently wide terms to include the purchase of realty, then, as a last resort, the trustees may make an application to the court under section 57 of the Trustee Act, 1925.

D. P.

Statutory Conveyances.—As was anticipated in some measure in an article published in the Conveyancer some time ago (*a*), section 6 (2) of the National Health Service Act, 1946, which

(*a*) See " Statutory Conveyances," by the present writer, in Volume 12 (N.S.), at p. 99.

purports to transfer to the Minister of Health local authority "hospitals," has resulted in litigation. In *Ministry of Health* v. *Stafford Corporation* (*b*) the question before the court was whether the corporation's freehold reversion in certain hospital premises, leased on the appointed day to a joint hospital board (constituted under a special Act), were transferred to the Minister under section 6 (2). The difficulty, of course, arose from the drafting of the statute, which talks of "hospitals" and "property" (*c*), but in no place seems to appreciate that a hospital cannot exist *in nubibus*, but must be situate on some parcel of land, in which, as here, there might well exist on the appointed day, more than one legal interest. The section is, in short, an excellent example of a statutory conveyance having no habendum and only ill-drawn parcels.

Danckwerts J. had held at first instance (*d*) that, as the land was used for the carrying on of the activities of a hospital immediately prior to the appointed day, all interests therein which were previously vested in a local authority, must be deemed to have been transferred by the section to the Minister. In the Court of Appeal, however, Romer L.J. pointed out that two different concepts pass to the Minister under section 6 (2)—"hospitals" and "property." "Hospitals," in his judgment, with which the other members of the court agreed, and having regard to the other provisions of the Act (in particular, the "definition" in section 79 (1)), meant hospital functions or activities, and possibly (by reason of the use of the word "vested") also interests in land held as part of the hospital undertaking. Whatever "property" may be intended to mean, the section provides that only such property as was held by a local authority immediately prior to the appointed day solely for the purposes of a hospital, should be transferred to the Minister. In this case, the reversionary interest of the Stafford Corporation came under neither "hospitals" nor "property," in the senses used in the subsection, and therefore that interest was not transferred to the Minister thereby.

Apart from the direct consequences of the decision, it is suggested that the case emphasises the importance of construing strictly the various "statutory conveyances" to be found in so many recent Acts of Parliament. What may at first seem to be a somewhat strained construction of the section should not be rejected

(*b*) [1952] 2 T.L.R. 302, noted *post*, p. 388.

(*c*) See definitions, if such they may be called, in s. 79 (1) of the Act—"property" is merely expressed to include "rights."

(*d*) [1952] 1 All E.R. 744, and see *ante*, p. 220.

without careful examination—on the one hand, the principle that Parliament should not lightly be charged with having deprived a subject of his fee simple without compensation, may be of assistance, and on the other, it is a general rule of statutory interpretation that " omissions are not to be lightly inferred " (*e*).

J. F. G.

Contracting Out of the Agricultural Holdings Act, 1948.—A correspondent draws our attention to the fact that Mr. J. F. Mackeson in his article in our last issue (*ante*, p. 277) makes no mention of the method of contracting out of the Agricultural Holdings Act, 1948, suggested by Mr. J. Muir Watt in the Current Law Guide No. 5, p. 9, namely, the grant of a tenancy for a fixed term of more than one year but less than two. Mr. Muir Watt says that " such a tenancy will automatically terminate by effluxion of time and the tenant will be unable to serve a notice under section 24 or to claim compensation for disturbance." *Jackson's Agricultural Holdings* (10th ed.), p. 109, takes the same view.

Mr. Mackeson's view is that, assuming this method is as effective legally as is suggested, it is in practice of somewhat limited value since, however scarce farms are to rent, a tenant is going to be hard pressed before he would take a farm for such a short period. It is possible, of course, that there might be a series of such terms but eventually in practice some sort of periodic tenancy is created and in that event one gets on to dangerous ground. Turning to Mr. Muir Watt's main contention, Mr. Mackeson thinks that it might be successfully contended that a lease or an agreement for a lease for a year and a fraction is a letting for an " interest less than a tenancy from year to year "; after all a tenancy from year to year, in the case of an agricultural holding, must last for at least two years. The expression " interest less than a tenancy from year to year " is capable of various interpretations. Alternatively, it might be argued that such a tenancy comes within another branch of section 2, namely a licence to occupy land for use as agricultural land. If the tenancy is caught by section 2, it becomes a yearly tenancy within the Act.

If such a tenancy were not within section 2, it would still appear to come within the definition of " contract of tenancy " in section 94. The tenancy would terminate by effluxion of time, since section 3 cannot apply, so that the tenant could not serve a

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(*e*) Maxwell, Interpretation of Statutes, 9th ed., p. 14.

notice under section 24 or claim compensation for disturbance under section 34, although he would presumably be able to claim other compensation, for example, for improvements under the Act.

Notice to Quit an Agricultural Holding.—Where the tenant of an agricultural holding is served with a notice to quit, the validity of which is doubtful, he can : (a) within one month serve a counter-notice under section 24 (1) of the Agricultural Holdings Act, 1948; (b) resist the claim on the ground that the notice to quit is bad. A reader asks whether these courses are mutually exclusive and draws attention to *Adler* v. *Blackman* [1952] 2 All E.R. 41 (noted *ante*, p. 306). We do not think there is any reason why both courses should not be pursued concurrently, although no doubt it would be advisable to place on record that the counter-notice is served without prejudice to the tenant's right to contend that the notice to quit is invalid. It is difficult to see how any estoppel could then arise.

J. F. M.

Service Occupancy—Lease or Licence.—We have received some correspondence asking whether it is still our view that the two forms of licence published in Volume 14, pp. 402 and 404, are effective to create mere licences as opposed to leases. We are quite unrepentant and still adhere to our view expressed in Volume 15, at p. 298, that they are effective. There does not appear to be any question of the law leaning to one side or the other; it does not discourage an employer from providing accommodation for an employee under an arrangement whereby the provision is personal to the employee and is terminable when the employment ceases or on the happening of any other event agreed upon, nor does the arrangement become turned into a tenancy because there is a deduction from the employee's wages. But there does appear to be something wrong with the law when a perfectly simple, reasonable and lawful arrangement cannot be put into legal form by an ordinary competent draftsman. What arrangement was arrived at in a given case depends entirely on the construction of the document embodying it read in the light of admissible evidence of the surrounding circumstances.

We are aware that some of the dicta in recent cases have blurred the distinction between leases and licences but, at any rate so far as service occupancy cases go, the test would still appear to be : was the employee merely given a personal right to exclusive enjoyment

or was he given exclusive possession? Two recent cases, *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386 (noted *ante*, p. 229), and *Gorham (Contractors), Ltd.* v. *Field* [1952] C.P.L. 266, may be contrasted. In the former case there were provisions giving the grantor, to use a neutral word, a right of entry and prohibiting assigning, underletting or parting with possession. Such provisions were fatal to the owner's contention that a tenancy had not been created, for they were consistent only with the grantee having been granted exclusive possession. Neither provision would have been necessary had the instrument merely created a personal right to exclusive enjoyment, for the grantor would have retained the possession (and the right to enter) and the grantee would have had nothing to assign. In the second case the instrument purported to be a licence and there was nothing in it or in the surrounding circumstances inconsistent with a licence; accordingly it was held to be one.

Although the mere insertion of a provision that the instrument is not to create a tenancy will be ineffective if it is inconsistent with the nature of the instrument when properly construed, such a provision would appear to us to be decisive where the instrument is equally consistent with its being a lease or a licence; the nature of the relationship between the parties "must in the last resort be a matter of intention" (*Booker* v. *Palmer* [1949] 2 All E.R. 674, at p. 676). The principal difficulty would appear to be caused by the draftsman's own fear that his instrument is not a licence and his desire to bolster it up by inappropriate clauses inserted *ex abundanti cautela*.

The Times Law Reports.—The incidence of mortality among law reports has been very high since the outbreak of the war: Commercial Cases, the Law Times Reports and the Law Journal Reports have all disappeared as separate publications. The Times Law Reports had, on account of their method of reporting, been rather less popular than some other reports, but as recently as 1950 they were thoroughly modernised. It is with regret that we note their disappearance at the end of this year. It is stated that their function will be taken over by the Weekly Law Reports, to be published by the Incorporated Council of Law Reporting for England and Wales.

From the beginning of next year the Law Reports will be published as before, the Weekly Notes will disappear and the Weekly Law Reports will take their place. The Weekly Law Reports will publish the full judgments, but not the arguments, of all cases which would under the present system appear in the

Weekly Notes and the Law Reports. Those not subsequently reported in the Law Reports will be segregated so that they can be bound separately. A subscriber can take the Weekly Law Reports alone for £4 4s. per annum or both the Weekly Law Reports and the Law Reports for £9 9s. per annum. We must confess that we wonder whether many members of the profession may not think £5 5s. is rather a substantial sum to pay for the benefit of the arguments. Today it is more the cost of binding than the cost of law reports that causes concern and we think this would have been a good opportunity for cutting down the number of annual volumes. Is there any serious drawback in mixing up the cases, particularly since the Complete Current Digest has disappeared? We gather that there will be some saving in the cost of binding the Law Reports if these are taken when bound.

We shall have to wait until next year to see whether the new system is successful, but, if it is going to be possible to maintain a comprehensive set of reports in the form of the Weekly Law Reports for £4 4s. a year, there will be rejoicing in many solicitors' offices, A practitioner setting up fresh in business could not start to build up law reports at a more modest price.

Trustees' Joint Accounts.—If the law is correctly laid down in *Brewer* v. *Westminster Bank, Ltd.* [1952] 2 T.L.R. 568 (noted *post*, p. 386)—and we have no ground for thinking otherwise—it should be changed, and changed immediately. In the 1925 legislation, Parliament set its face against the sole trustee: trustees for sale, Settled Land Act trustees and, in some cases, administrators must be at least two in number, unless a trust corporation is trustee. The device is simple but it has proved an adequate safeguard against fraud. Now this safeguard is largely nullified: if the trustees open a joint banking account and one trustee signs a cheque and forges the signature of the other, the latter cannot sue the bank, for the trustees' claim is a joint one and the wrongdoing of the one trustee is a bar to a claim by both. It seems rather pointless to stipulate for the double signature if the bank is free to act on one.

Is a Controlled Rent necessarily a Rack-Rent ?—It is with regret that we record the failure of Mr. Rawlence's gallant attempt to secure a measure of justice for the hard-pressed landlord. In *Rawlence* v. *Croydon Corporation* [1952] 2 T.L.R. 460 the local authority served a sanitary notice under section 9 of the Housing Act, 1936, on the landlord as being the person in receipt of the

rack-rent of the premises in question. As the defects were due to the tenant's breach of covenant the plaintiff felt incensed. Rack-rent is defined in section 9 as being rent which is not less than two-thirds of the full net annual value of the house and, as the house was within the 1920 Rent Restrictions Act, the plaintiff was able to satisfy the county court judge that the maximum rent he was entitled to was less than two-thirds of what the rent would have been had it not been controlled. Nevertheless the Court of Appeal held that the recoverable rent was the full net annual value and distinguished *Poplar Assessment Committee* v. *Roberts* [1922] 2 A.C. 93, where it was held that in rating law one is concerned with value to the tenant so that for rating purposes rent control is ignored. Under the Housing Act full net annual value means value to the landlord. This is yet another decision exemplifying the gross inequity of the Rent Restrictions Acts. Most laymen would regard it as somewhat ironic to describe the recoverable rent of a house within the 1920 Act control as the "full net annual value" and would feel confirmed in their belief that lawyers live in a little realm of their own with curious laws of economics and an even more curious language.

Mathematics and the Application of Assets.—Sooner or later a solicitor acting in the administration of a deceased's estate has to produce accounts and, unfortunately, he will find that estate duty cannot be taken at a nice round figure "in the interests of arithmetical convenience." Although the point of Mr. G. Boughen Graham's fable (*ante*, p. 257) is in no way affected, his mathematics are quite wrong. In fairness to Mr. Graham, we must point out that we did not notice his errors and he beat our correspondents by a short head in discovering that the estate account would not balance. To arrive at his round £30,000, the personalty must be increased to £6,000 giving, with the realty (£45,000), a gross estate of £51,000 and a net estate of £45,000; the estate duty must then be increased from 30 per cent. to 33⅓ per cent. Those familiar with the way in which a surveyor's proof of evidence, showing how adherent goodwill for the purpose of the Landlord and Tenant Act, 1927, is arrived at, is adjusted as the hearing proceeds will have no difficulty in following the adjustment of Mr. Graham's figures.

Finance Act, 1952.—It is regretted that owing to the indisposition of Mr. Desmond Miller, his article on the Finance Act has been postponed to the next issue.

LICENSEES AND SUCCESSORS IN TITLE OF THE LICENSOR

By Professor F. R. Crane, ll.b., Solicitor

1.—General

The purpose of this article is to examine the rights of licensees against successors in title of the licensor. The general opinion has seemed to be that the licensee has no rights at law (*e.g.*, Clerk and Lindsell on Tort, 10th ed., p. 526; Salmond on Tort, 10th ed., p. 246) and that in equity only agreements to create legal estates or interests—estate contracts—can be enforceable against successors in title (Salmond, *op. cit.*; E. O. Walford, "The Nature and Effect of Licences," 11 Conveyancer (n.s.) at p. 183). Recent decisions indicate that too narrow a view may have been taken of the position.

The anomaly of giving a licensee no protection against third parties is emphasised by the substantial security he now enjoys against the licensor. Where the licence is revocable reasonable notice of revocation must be given and until it has elapsed the licensee cannot be treated as a trespasser: *Minister of Health* v. *Bellotti* [1944] K.B. 298; *Winter Gardens Theatre (London), Ltd.* v. *Millennium Productions, Ltd.* [1948] A.C. 173; a licence made irrevocable by contract cannot be revoked in breach thereof, at any rate if the contract is suitable for specific enforcement: *Winter Gardens Case, supra*; *Errington* v. *Errington* [1952] 1 K.B. 290. The older and more limited doctrines of the irrevocability of licences coupled with grants and executed licences may also be invoked in appropriate cases: *Jones* v. *Earl of Tankerville* [1909] 2 Ch. 440; *Canadian Pacific Railway, Ltd.* v. *R.* [1931] A.C. 414.

However, the problem is made still more acute by the new type of licence where the licensee may have "exclusive possession."

2.—New Types of Licence

Substantial authority now exists for the proposition that a person with "exclusive possession" of land or premises is not necessarily a tenant but may be only a licensee. The cases, regarded by Denning L.J. as starting with *Booker* v. *Palmer* [1942] 2 All E.R. 674, are collected in his judgment in *Errington* v. *Errington*, where he said [1952] 1 K.B. at p. 298, "The result

of all the cases is that, although a person who is let into exclusive possession is, prima facie, to be considered a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that what was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held to be only a licensee." Varied circumstances and conduct have been held relevant in this connection :—(i) Status of the licensor—A requisitioning authority, having only a statutory right to possession and no estate or interest in the land, cannot create a tenancy, so that persons whom it puts into occupation can only be licensees; *Ministry of Agriculture and Fisheries* v. *Matthews* [1950] 1 K.B. 148, and cases there cited. (ii) Status of the licensee—A deserted wife has now been established as a licensee in a special position " under which the husband cannot turn her out without an order of the court " *per* Romer L.J. (citing Denning L.J. in *Errington* v. *Errington*) in *Bendall* v. *McWhirter* [1952] 2 Q.B. at p. 485, where the husband's trustee in bankruptcy was held to be in the same position. (See also the article " Disputes over the Matrimonial Home," by E. F. George, *ante*, p. 27, and *Lee* v. *Lee* [1952] 1 All E.R. 1299.) (iii) Family arrangements—In *Errington* v. *Errington*, *supra*, an arrangement whereby a father allowed his daughter and son-in-law to live in a house so long as they paid mortgage instalments was held to create a licence irrevocable according to its tenor and binding on the licensor's devisee; in *Cobb* v. *Lane* [1952] 1 All E.R. 1199 a brother living rent free in a house owned by his sister was held a licensee rather than a tenant at will, so after thirteen years he could not claim a title by adverse possession under the Limitation Act, 1939. (iv) Intention of the parties, having regard to the circumstances, especially hardship that might arise from the application of the Rent Restrictions Acts—An old man permitted to end his days in a cottage rent free has been held a licensee : *Foster* v. *Robinson* [1951] 1 K.B. 149; so has a daughter who on the death of a statutory tenant was not entitled to the protection of the Rent Acts but was permitted to remain for a time in the premises; *Marcroft Wagons* v. *Smith* [1951] 2 K.B. 496. Whether a purchaser allowed into possession before completion is a tenant or licensee now depends on the nature of the agreement—compare *Francis Jackson Developments, Ltd.* v. *Stemp* [1943] 2 All E.R. 601 (tenancy) with *Dunthorne and Shore* v. *Wiggins* [1943] 2 All E.R. 678 (licence.)

In some recent cases the Court of Appeal has had to draw attention to the limits of the doctrine—*e.g.*, *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386, and *Davies* v. *Davies* reported in [1952] Current Property Law 318. All these cases—and there have been others not reaching the regular reports—indicate that a substantial number of persons may be living in their homes as licensees.

It is recognised that the soundness of the doctrine that "exclusive possession" does not necessarily involve a tenancy has been questioned (*a*), and the volume of litigation shows that some uncertainty has been introduced into the law as between the parties to a transaction, quite apart from the problem of third parties. However, in this article it is not proposed to examine these criticisms nor to consider whether blame, if any be due, should rest on the courts or the legislature. Unless and until the House of Lords changes the position litigants and practitioners must accept the law as laid down in the Court of Appeal. Whether or not it is, or is becoming, an interest in land in the general sense of the term, a new type of licence or a new interest has undoubtedly been created. In *Marcroft Wagons* v. *Smith*, *supra*, Evershed M.R. said, [1951] 2 K.B. at p. 501, that before the Rent Acts the law, broadly speaking, necessarily inferred a tenancy from exclusive possession at a rent, but it was now clear that "a new *monstrum horrendum, informe, ingens* has come into our ken—the conception of a statutory tenancy, the conception that a person may have such a right of exclusive possession of property as to entitle him to bring an action for trespass against the owner of that property (*b*), but yet that such right would not confer any interest whatever in the land on the occupier who would not be able to dispose of it by grant or by testamentary disposition. It is, as has been said, a statutory right of irremovability." He went on to hold (at p. 503) that the existence of a licence in the instant case was "compatible with the conception which is to be found in the statutory tenant, and that to be found in other examples of a right to occupy premises with many of the attributes of a tenancy but without the usual qualifications of having any interest in land." Roxburgh J. in his judgment transferred the epithet "*monstrum horrendum*" to the interest of a licensee and called for a new name "because that word [licence] has, in connection with landlord and tenant, already been appropriated to quite different situations" (at p. 507).

(*a*) See R. E. Megarry, "The Rent Acts and the Invention of New Doctrines," 67 Law Quarterly Review, pp. 505–21 at p. 508, "manifest difficulties in the conception of a tenancy which is not a tenancy."

(*b*) And, of course, successors in title so far as statutory tenancy is concerned.

The word licence has now been adopted by the courts to describe this new conception of a person in full occupation without a tenancy. Nevertheless the use of that word does not necessarily mean that all the characteristics of licences of quite a different nature must inevitably be applicable. The term licence now covers infinitely variable circumstances, from the casual entry into my garden with permission of a boy to fetch his ball, to indefinite residence in a house under an irrevocable contract. The use of any term to describe varying sets of facts is proper when they all carry, broadly speaking, the same legal consequences; if this causes difficulties, either the description or the suggested consequences may be erroneous (*c*). The legal effects of the new conception of a licence accepted by the courts must, it is submitted, be analysed without undue reliance on the legal effects of very different arrangements called by the same name; it seems likely that we shall have to recognise the existence of classes of licences with varying results in law.

3.—Licensees and Possession

It must be emphasised that the legal effect of attributing "exclusive possession" to licensees can only be determined in relation to the particular problem involved. It is not sufficient to ask "Can a licensee have possession?" for that question is incapable of a short answer. For example, a husband appears inevitably to retain possession through his deserted wife for the purpose of preserving his tenancy under the Rent Restrictions Acts (*Middleton* v. *Baldock* [1950] 1 K.B. 657), and possession of a cottage has been held to be acquired by an owner for the purposes of decontrol despite the fact that a gardener lived there rent free (*Gedge* v. *Broughton* [1929] 1 K.B. 103). On the other hand, in determining whether a tenant had broken a proviso that he should not part with possession Farwell J. said in *Stening* v. *Abrahams* [1931] 1 Ch. 470 at p. 474 "The fact that the agreement [for advertising hoardings] is in form a licence is immaterial as a licence may give the licensee so exclusive a right to the legal possession as to amount to a parting with possession"—a passage cited with approval by Slesser L.J. in *Gee* v. *Hazelton* [1932] 1 K.B. 179 at p. 192.

(*c*) The case of the mortgagor in possession without any attornment clause is an instance, for he was variously regarded as tenant at will, tenant at sufferance and mere mortgagor (*per* Parke B. in *Every* v. *Smith* (1857) 26 L.J.Exch. 344). Professor Waldock has shown (Law of Mortgages, 2nd ed., pp. 218–20) that neither of the first two views could be sustained in all circumstances and concludes that in view of the statutory powers they now enjoy "it is sufficient to describe mortgagors as being in possession as mortgagors.".

Again, a licensee of the new type might well be able to prove the *de facto* possession which entitles even a wrongdoer to protection against interference by a stranger (see, for example, *Asher* v. *Whitlock* (1865) L.R. 1 Q.B. 1 and as to nuisance, *Newcastle-under-Lyme Corporation* v. *Wolstanton, Ltd.* [1947] 1 Ch. 92, at pp. 105–111). Surely a mere squatter should not be in a better position than a lawful licensee? In such an action the title of the licensee is irrelevant, for the defendant cannot plead the *ius tertii*. But if a licensee seeks to recover possession, even against someone who has dispossessed him, he must rely on his own title and the *ius tertii* can, probably, be pleaded (*Doe* d. *Carter* v. *Barnard* (1849) 13 Q.B. 95); in such an action the conclusion might be that the licensee has no sufficient title. Against a successor in title of the licensor, however, the question is purely one of title; it depends, as Roxburgh J. said in *Thompson* v. *Earthy* [1951] 2 K.B. 596 at p. 599, on whether the licensee "has any legal or equitable interest in the premises which runs with the premises so as to bind them in the hands of a purchaser." Possession, occupation or mere user may be an integral part of that title (*infra*, p. 338) and may, subject to any requirement of registration, operate to give notice of the licensee's rights (*infra*, p. 343). In *Thompson* v. *Earthy*, *supra*, Roxburgh J. held that a deserted wife in the matrimonial home had no right effective against a purchaser with notice. On this point, as will be seen, the authority of the case is somewhat shaken but there can be no doubt that the learned judge stated the correct test in the passage quoted above (*d*).

4.—Contractual Licensees and Successors in Title of the Licensor

Interest today is centred on the extent to which contractual licences and the rights of the deserted wife will bind successors in title, and this aspect will be the primary topic of discussion.

(1) Licences arising under Estate Contracts

If the agreement amounts to an estate contract—an agreement to create a legal estate or interest as defined in section 1 of the

(*d*) Similarly, mere registration of, *e.g.*, a restrictive covenant under the L. C. A., 1925, does not make it enforceable if no one is entitled to the benefit. Nor, it is submitted, does s. 70 (1) (g) of the L. R. A., 1925, making rights of persons in possession or occupation overriding interests have any validating effect on doubtful rights. It would not enable a wrongdoer to retain possession. It merely means that if there are rights, they are valid against everyone without protection on the register. And see Potter, Principles of Land Law under the Land Registration Act, 2nd ed., p. 41; Brickdale and Wallace, Land Registration Act, 1925, 4th ed., p. 196.

Law of Property Act, 1925—it will bind all successors in title subject to the requirements of protection under the Land Charges Act, 1925, or the Land Registration Act, 1925. Prior to 1926 such agreements were enforceable against successors under the old rules relating to notice; *Hervey* v. *Smith* (1856) 22 Beav. 299, *Allen* v. *Seckham* (1879) 11 Ch.D. 794, and *Lowe* v. *Adams* [1901] 2 Ch. 598 are examples where agreements for easements or profits were involved.

(2) " Executed " Licences of a Permanent Character

At common law the doctrine of the irrevocability of executed licences was limited to acts done on the licensee's land (*Liggins* v. *Inge* (1831) 7 Bing. 682 and Gale on Easements, 12th ed., p. 49). In equity the principle was wider—if A, by direct permission, encouragement or acquiescence, allowed B to do something of a substantial nature on his own or A's land in violation of A's rights, A could not afterwards seek to restore the position. The rule dates at least from Lord Somer's Chancellorship (1693–1700) for in *Short* v. *Taylor* (cited in 2 Eq.Cas.Abr. at p. 522) Short, who after encouraging Taylor to build a house partly on his (Short's) land brought an action, was restrained by injunction. The principle has been variously stated; in *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60 Romilly M.R. said (at pp. 74–5) " he who stands by and encourages an act cannot afterwards complain of it or of interference with the enjoyment of that which he has permitted to be done "; in *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129 at p. 170 Lord Kingsdown spoke in terms of the creation of the expectation " that he shall have a certain interest " followed by possession upon the faith of such expectation; *Plimmer* v. *Mayor of Wellington* (1884) 9 App.Cas. 699 mentioned a " supervening equity," while in *Canadian Pacific Railway, Ltd.* v. *R.* [1931] A.C. 414 Lord Russell of Killowen said (p. 429) " The foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying " (*e*). There are numerous cases applying the doctrine as between the parties to a wide variety of circumstances, while the remedies given have not been stereotyped but adapted to the

(*e*) Before this sentence Lord Russell referred to equitable estoppel but there are differences between the principle under discussion and that doctrine as stated in *Willmott* v. *Barber* (1880) 15 Ch.D. 96. On the other hand there is obviously a close resemblance to the extensions of estoppel enunciated in *Central London Property Trust* v. *High Trees House, Ltd.* [1947] 1 K.B. 130; and *Combe* v. *Combe* [1951] 2 K.B. 215; see also *post*, p. 341.

needs of the case (*f*). Romilly M.R. applied the principle against purchasers for value with notice in three cases—*Duke of Beaufort* v. *Patrick*, *supra*; *Somerset Coal Canal Co.* v. *Harcourt* (1857) 24 Beav. 571; and *Mold* v. *Wheatcroft* (1859) 27 Beav. 510 (*g*). In all these cases the licensees had statutory authority but had entered into informal arrangements instead; in the first two conveyances of land taken for canals were decreed on payment of compensation and in the third case a tramway allowed to remain. But in the last case an engine house erected was not within the Act and Romilly M.R. said that on the general principle of acquiescence "neither he (the owner) nor any person claiming under him [with notice] can say that the owner of the building has not a right to the use of that land" (27 Beav. at p. 520).

It may be that informal arrangements replacing the exercise of statutory powers are *sui generis*—in the *Winter Gardens Case* perpetual running rights over railways were so regarded by Lords Simon, Porter and MacDermott—[1948] A.C. at pp. 191, 195 and 203, distinguishing *Llanelly Railway & Dock Co.* v. *London & N. W. Ry.* (1875) L.R. 7 H.L. 550. Further, most of the cases can be regarded as arrangements leading to conveyances, leases or the creation of easements; Gale collects them under the head "Constructive Grant (by Acquiescence)"—12th ed., pp. 55–66, and see *McManus* v. *Cooke* (1887) 35 Ch.D. 81. In the cases themselves, however, neither of these points seem to have been the basis of the reasoning. On the other hand, the rules relating to licences were not canvassed until the later Privy Council decisions in *Plimmer* v. *Mayor of Wellington* and *Canadian Pacific Railway, Ltd.* v. *R.*, *supra*; in these cases, neither of which involved third parties, the principle was treated as applicable to claims involving no more than licences creating only limited rights of user. It is not easy to see how these rights of a permanent nature could be held invalid against third parties without stultifying the underlying idea. Here, too,

(*f*) *Short* v. *Taylor*, *supra*—building on another's land—action restrained; *Rochdale Canal Co.* v. *King* (1853) 16 Beav. 630—millowner encouraged to build mill and take water for eighteen years—action by Canal Co. dismissed; *Jackson* v. *Cator* (1800) 5 Ves. 688—defendant restrained from cutting timber reserved to him in a lease because he had encouraged licensees to incorporate it in an ornamental scheme; *East India Co.* v. *Vincent* (1740) 2 Atk. 83—mandatory injunction to pull down wall blocking windows in building erected on defendant's land by plaintiff with defendant's knowledge and acquiescence: *Stiles* v. *Couper* (1748) 3 Atk. 682—tenant in tail not bound by lease given by his predecessor directed to grant a new lease on proof of six years' acceptance of rent while plaintiff made costly alterations; *Dillwyn* v. *Llewellyn* (1862) 4 De G.F. & J. 517—son in occupation and erecting a house with consent of father entitled to call for a conveyance from father's infant devisee; *Plimmer* v. *Mayor of Wellington*—licence to erect jetties and wharves declared irrevocable. In *C. P. Ry.* v. *R.*, *supra*, the principle was held inapplicable for lack of encouragement or acquiescence.

(*g*) See also *Moreland* v. *Richardson* (1857) 24 Beav. 33, discussed *infra*, p. 338.

the wide modern use of the term "licence" may be productive of confusion.

There does therefore seem to be earlier authority for arguing that equity can intervene on general principles to protect against successors in title with notice licences upon which the licensee has acted to his detriment, though the extent of the jurisdiction has not been clearly defined.

(3) Recent decisions on other Contractual Licences

The recent cases which have suggested that licences may be effective against successors in title on a much wider front are *Errington* v. *Errington* [1952] 1 K.B. 290; *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; and *Ferris* v. *Weaven* [1952] 2 All E.R. 233; with *Re Webb* [1951] 1 Ch. 808 as something of a runner-up. *Thompson* v. *Earthy* (*supra*, p. 327) is therefore of doubtful authority.

(*a*) *Ferris* v. *Weaven*

This decision, although the most recent, may be disposed of first. A husband left his wife telling her she could remain in the matrimonial home. Ten years later he conveyed the house to his brother-in-law the plaintiff for £30 which was never paid. The plaintiff, who was found to have entered into the transaction only to oblige the husband and to help him get possession, never exercised any acts of ownership while the husband continued to pay rates and mortgage instalments. Jones J. refused to make an order for possession against the wife primarily because he considered himself bound by *Errington* v. *Errington* and *Bendall* v. *McWhirter* but also to some extent on the facts. It would seem that, apart from the authorities referred to the circumstances required judgment for the defendant, or the court would have held that a collusive and unreal transaction—a sham sale—could give the husband indirectly advantages that he could not obtain directly except by an order of the court under the Married Women's Property Act, 1882. A genuine purchaser with notice, even at a deflated price by reason of doubts about his ability to gain possession, is in an entirely different category, it is submitted, from the plaintiff in *Ferris* v. *Weaven*.

(b) *Errington* v. *Errington*

The transaction in *Errington* v. *Errington* was described by Somervell L.J.—[1951] 1 K.B. at p. 193—as not unnatural but legally novel. In 1936 a father purchased a house with a building

society mortgage and gave his son and daughter-in-law possession so long as they paid the mortgage instalments; when the mortgage was discharged the property was to be theirs (*h*). In 1945 the father died leaving all his property to his widow; shortly afterwards the son left his wife and went to live with his mother. She claimed possession from her daughter-in-law, who had continued to live in the house and pay the instalments. The Court of Appeal (Somervell, Denning and Hodson L.JJ.) held (i) the couple were not tenants at will or any other sort of tenants, (ii) there was no contract of sale followed by part performance, (iii) there was an irrevocable contractual licence binding on the widow. The second and third points require some discussion.

As to (ii), had there been an estate contract the widow would clearly have been bound, and in her case non-registration would not have been relevant (L. C. A., 1925, s. 13 (2)). All three Lords Justices said (see pp. 293–4, 300 and 301) that the couple were not purchasers because no undertaking to pay instalments could be implied (*i*) but they also considered that the father and the estate would be bound to convey when the mortgage was paid off. It is somewhat difficult to see why the essential point was not the latter—the existence of a contract to convey a legal estate, though subject to a condition precedent performable or not at the option of the purchaser; one may compare *Sharp* v. *Coates* [1948] 2 All E.R. 871 where a tenant's agreement to create a term of years if he became entitled to the reversion was held to be a registrable estate contract. It has also been pointed out that an option to purchase even before it is exercised gives a purchaser an equitable right binding on third parties (*k*). On this view of *Errington* v. *Errington* the couple in possession would still have been licensees but no new principle regarding third parties need have been enunciated. However, on point (iii) above the Court of Appeal, as has been said, held there was an irrevocable contractual licence, Somervell L.J. agreeing with the more elaborate judgment delivered by Denning L.J. That was chiefly concerned to show that persons in exclusive possession may be licensees and the sentence " Neither the licensor nor anyone

(*h*) This promise was apparently made to the daughter-in-law alone but the court proceeded on the basis that the couple were jointly entitled to whatever rights there were.

(*i*) Hodson L.J. said also (p. 301—and see Somervell L.J. at p. 293) that it would not be reasonable to find a conveyance to the father if there was a contract of sale. However, this may have been the easiest way to achieve the desired result. The vendor would not be willing to keep the legal estate. The building society might have been willing to take the couple as mortgagors with the father's guarantee, but then the arrangement that the premises were to be his if the instalments dropped would involve some complicated drafting.

(*k*) H. W. R. Wade, " Licences and Third Parties," in 68 Law Quarterly Review, p. 337, at pp. 350–2.

else who claims through him can disregard the contract except a purchaser for value without notice" was not supported in detail by authority. However, that omission (*l*) was made good in *Bendall* v. *McWhirter* and consequently *Errington* v. *Errington* need not be further considered in detail.

(c) *Bendall* v. *McWhirter* [1952] 2 Q.B. 466—*per* Somervell and Romer L.JJ.

The facts here were that in April, 1950, the husband left his wife (the defendant) saying "You can have the house and furniture. I am not coming back." In January, 1951, he became bankrupt. The defendant refusing to leave, the plaintiff who was trustee in bankruptcy claimed possession and a sum for use and occupation. The Court of Appeal in considered judgments found for the defendant for varying reasons.

Romer L.J., with whom Somervell L.J. concurred, first adopted (at p. 485) the statement by Denning L.J. in *Errington* v. *Errington* ([1952] 1 K.B. at 298) that the wife was a licensee with a special right under which the husband could not turn her out without an order of the court, and then held that a trustee in bankruptcy takes property in the same "plight and condition" (*m*) as the bankrupt and subject to all rights validly acquired by third persons unless assisted by some express provision of bankruptcy law. Consequently the trustee could be in no better position than the bankrupt and was bound by the wife's licence; if the wife and trustee could not agree the latter could go to the court, probably under section 105 of the Bankruptcy Act, 1914 (*n*).

(d) *Judgment of Denning L.J. in Bendall* v. *McWhirter*

The principal interest of the case lies in the elaborate judgment of Denning L.J., for he held that the deserted wife was in the same position as a contractual licensee who if "in actual occupation of the land has an interest which is valid, if not in law at any rate in equity, against the successors in title of the licensor" (at p. 483 (*o*)). The general reaction to this judgment may perhaps

(*l*) H. W. R. Wade, *op. cit.*, demonstrates that *Errington* v. *Errington* standing alone could be heavily criticised; *Bendall* v. *McWhirter* was not decided when the article was written.

(*m*) The learned Lord Justice cited with approval a passage from Halsbury's Laws of England, 2nd ed., Vol. 2, p. 209, containing this phrase.

(*n*) The alternative mentioned and preferred apparently by Denning L.J. was an application under s. 17 of the Married Women's Property Act, 1882, or in the bankrupt's name under s. 22 of the Bankruptcy Act, 1914. As to possible terms, see *per* Denning L.J. at pp. 484–5 and Romer L.J. at pp. 488–9.

(*o*) The context makes clear that he did not think a purchaser for value without notice would be bound.

be expressed without disrespect in words used by Holt C.J. in *Ashby* v. *White* (1703) 2 Ld.Raym. 938 at p. 956 of something said by his brother Powell J. "It is indeed a fine opinion, but I do not know whether it will bear debating, and how it will prove, when it comes to be handled." If the principles set out are accepted and followed *Bendall* v. *McWhirter* must rank with *Tulk* v. *Moxhay* as a decision creating a new interest in land. To refute the objection ". . . that a contractual licence only gives rise to contractual obligations and not to any proprietary rights or interests, and that the burden of it does not, therefore, run with the land" (p. 479) Denning L.J. marshalled authorities both at common law and in equity.

(i) The Common Law position

As to common law, the learned Lord Justice said (p. 479) "In the year 1618 and for over 200 years afterwards it was held that a contractual licence to use and occupy land, once it was acted on by entry into occupation, was binding, not only on the licensor but also on his successors in title, and that it was not revocable except in accordance with the terms of the contract. If the licensor or his successor ejected the licensee or his goods he was liable in assault or trespass as the case might be : see *Webb* v. *Paternoster* where a licence to stack hay was held binding on the successors of the licensor including his tenants; *Wood* v. *Lake* where a parol licence to stack coals for seven years was held irrevocable except in accordance with the contract; *Tayler* v. *Waters* where a licence to enjoy beneficial privileges in the opera house was held to be not revocable at will; *Wallis* v. *Harrison* where a licence to make and use a railway was held not binding on successors because it was merely executory. These cases were much considered in *Wood* v. *Leadbitter* and the only criticism directed at them was that they should have been under seal." A short answer to this quotation may be that since 1925 the only interests that can exist at law are those enumerated in section 1 (1) of the Law of Property Act, 1925, that "easement right or privilege" is the only category that could include licences, but that to be legal these must be for an interest equivalent to a fee simple or term of years absolute (L. P. A., 1925, s. 1 (2) (a)). This would rule out most occupational licences, including the wife's special right, but not necessarily agreements for advertisements, etc. (*p*). Therefore the authorities must be examined; several comments may be made.

(*p*) Then s. 187 of the L. P. A., 1925, becomes relevant: "Where an easement right or privilege for a legal estate is created it shall enure for the benefit of the land to which it is intended to be annexed." However, profits à prendre in

First, *Wood* v. *Lake* (1751) Say. 3, and *Tayler* v. *Waters* (1816) 7 Taunt. 374, were actions between the parties; in the latter case the manager who gave the silver admission tickets constituting the licence was held to have authority to bind owners of the theatre—compare *Coleman* v. *Foster* (1856) 1 H. & N. 37, *infra*. Second, that *Webb* v. *Paternoster* (1618) variously reported—Popham 151; Palmer 71; Godbolt 282—does not really show much more than doubt as to the nature of licences. The facts were that Plummer licensed Webb to stack hay on his (Plummer's) land until it could conveniently be sold; subsequently Plummer leased the land to Paternoster who put in cattle which ate the hay, so Webb sued in trespass. Two years elapsed between the licence and the eating. Various views (reported especially in Palmer) were put forward by the judges as to the irrevocability of executed licences, licences of profit as opposed to licences of pleasure, and licences coupled with grants; a possible duty on Webb to fence the hay was mentioned. The decision on which all agreed was that Webb must fail because he had had ample time to sell the hay (*q*). It was to the licence in *Webb* v. *Paternoster* that Parke B. was referring in *Wallis* v. *Harrison* (1838) 4 M. & W. 544 when he spoke of a licence conferring "a sort of interest against the licensor and his assigns" (*r*). Parke B., it is submitted, was thinking in terms of grant rather than contract. Ownership of chattels, *e.g.*, on purchase of hay or cut timber, apparently amounts to a grant so as to make a licence to inspect or fetch irrevocable between the parties (*Wood* v. *Manley* (1839) 11 A. & E. 34; *Jones* v. *Earl of Tankerville* [1909] 2 Ch. 440; *Ellis* v. *Noakes* [1932] 2 Ch. 98) and successors in title would it seems be also bound, since the right is proprietary (*s*). Third, there is other authority to the effect that a licence without a grant does not bind successors in title at law whether acted upon or not. In *Coleman* v. *Foster* mentioned above, trustees owning a theatre for themselves and other proprietors demised the theatre to S reserving to the proprietors the right, held to be a licence, to come in free. S subdemised for two nights to the plaintiff subject to the reservation, but the latter successfully brought trespass against a

gross are still contemplated in the books, so perhaps the section is not as far-reaching as it sounds, though licences are often more akin to easements than to profits.

(*q*) The requirement of reasonable notice of revocation affects successors in title—*Aldin* v. *Latimer Clark & Co.* [1894] 2 Ch. 437; apparently Webb's notice was implicit in the original licence. Today even if a licence is revoked it may be conversion to deal with the licensee's property—*Ellis* v. *Stenning* [1932] 2 Ch. 81; *Munro* v. *Willmott* [1949] 1 K.B. 295.

(*r*) Cited by Denning L.J. in *Bendall* v. *McWhirter*, at p. 480.

(*s*) See also *Crosby* v. *Wadsworth* (1805) 6 East 602; and *Wellaway* v. *Courtier* [1918] 1 K.B. 200—sales of hay and turnips, uncut and in the ground respectively, entitling purchasers to possession.

proprietor who entered. Here the licence was acted upon as far as possible. Pollock C.B. said "If a man gives a licence and then parts with the property over which the privilege is to be exercised, the licence is gone." Exactly the same rule was applied to executory licences in *Roffey* v. *Henderson* (1851) 17 Q.B. 574 and *Wallis* v. *Harrison, supra.*

Fourth, when the criticisms about the lack of a seal were made in *Wood* v. *Leadbitter* (1845) 13 M. & W. 838 (*t*) easements in gross were still considered possible (Gale on Easements, 12th ed., pp. 13–4) for the requirement of a dominant tenement was not established till *Rangeley* v. *Midland Ry.* (1868) L.R. 3 Ch.App. 306; in addition the courts were in the early nineteenth century insisting that easements must be created by deed (*e.g.*, *Hewlins* v. *Shippam* (1826) 5 B. & C. 221) for little authority on their nature existed (*u*). Rights to enter given under seal could in 1845 have been regarded as legal easements. But after easements in gross became impossible it was not a question of form but of substance. If this be so Baron Alderson in *Wood* v. *Leadbitter* (*a*) was insisting not on a technicality but on the fundamental principle that an effective proprietary right must be one known to the law and properly created—the principle applied in *Hill* v. *Tupper* (1863) 2 H. & C. 121. In saying (13 M. & W. p. 845) that a mere licence however created was revocable but a licence coupled with a grant was irrevocable provided the grant was validly made according to the nature of the property concerned, he accurately stated the common law position (*b*). Fifth, although the common law did have a rule that executed licences were irrevocable it was limited to acts done on the licensee's own land which would otherwise have given rise to actions of nuisance—*Liggins* v. *Inge* (1831) 7 Bing. 682; Lord Ellenborough held revocable in *Doe* d. *Foley* v. *Wilson* (1809) 11 East 56 an implied licence under which land had been enclosed for some 12 years, and in *R.* v. *Inhabitants of Horden-on-the-Hill* (1862) 4 M. & S. 562 a licence under which a cottage had been built on the licensor's land.

(*t*) Here a contractual licence to enter a racecourse, duly acted upon was held revocable by the licensor, and obviously a successor in title would not be in a *worse* position.

(*u*) The nature of easements was only settled in the nineteenth century; Gale in his original preface (1839) complained of the paucity and irreconcilability of authority and his treatise has been called the starting point of the modern law—Holdsworth, History of English Law, Vol. 7, p. 323. Failure to appreciate the history of easements led, it is suggested, to the unsatisfactory views about the nature of a grant in *Hurst* v. *Picture Theatres* [1915] 1 K.B. 1.

(*a*) Baron Alderson showed (13 M. & W., p. 850) in speaking of *Wood* v. *Lake* that he recognised an action of assumpsit between the parties might have given the licensee a remedy.

(*b*) The development of the rules defining easements may have limited the scope of the principle—see *infra*, "Licence coupled with Grant."

To sum up, it must be submitted with respect that the decisions do not establish that a contractual licence, if acted upon, binds successors in title of the licensor at law—where notice would be irrelevant—even if the licence is of a character to come within section 1 of the L. P. A., 1925.

(ii) Equity—analogy with restrictive covenants

Turning to equity, Denning L.J. said first ([1952] 2 Q.B. pp. 480–1) " Every contractual licence imports a negative covenant that the licensor will not interfere with the use and occupation of the licence in breach of the covenant. This negative covenant is binding on successors in title in the same way as a restrictive covenant . . . " and supposing that in *Tulk* v. *Moxhay* (1848) 2 Ph. 774 there had been an additional covenant to allow residents in the square to use the Leicester Square gardens it would be " . . . nothing more or less than a contractual licence to use the garden. But surely both covenants would be held binding on the successors in title. There is no reason in principle to distinguish between them and there is direct authority in favour of it "; he cited *Moreland* v. *Richardson* (1856) 22 Beav. 596; (1857) 24 Beav. 33; *Andrew* v. *Aitken* (1882) 22 Ch.D. 218; *Sharpe* v. *Durrant* (1911) 55 S.J. 423; and Salmond on Tort, 7th ed., at p. 290.

The principle of implying negative covenants so as to found jurisdiction to grant injunctions is of course applicable to contracts creating licences—Lord Greene M.R. relied on it when the *Winter Gardens Case* was in the Court of Appeal ([1946] 1 All E.R. at p. 685)—but something more is needed, for no one has suggested that all contracts enforceable by injunction bind third parties (*c*). Therefore the essential factor becomes the analogy between licences and restrictive covenants and the question is whether the differences are vital. First, it must be observed that since *L. C. C.* v. *Allen* [1914] 3 K.B. 672 a person enforcing a restrictive covenant against a successor in title must have some interest in neighbouring land capable of being benefited, so that earlier cases which do not insist on this requirement may be suspect. Second, a restrictive covenant requires A to refrain from making certain use of his own land, while a licence permits B to do something on A's land. However, dicta of Fry J. in *Andrew* v. *Aitken*, *supra*, and the decisions in *Sharp* v. *Durrant*, *supra*, and *Matthews* v. *Hanscomb* [1936] 1 All E.R. 562 indicate that obligations to enter to permit work may be enforceable against a successor in title. In *Ex p. Ralph* (1845)

(*c*) An action for interference with contract may sometimes produce a similar practical result—*Lumley* v. *Gye* (1853) 2 E. & B. 216.

De G. 219, Knight-Bruce V.-C. suggested a power of entry as the appropriate method of securing performance of restrictive covenants, while in Key and Elphinstone's Precedents of Conveyancing (14th ed., pp. 605–766) such rights are included as a protection to positive covenants. It is submitted that where schemes of covenants are involved licences connected therewith (*d*) might well be held effective against successors in title by analogy with restrictive covenants, but that then all the rules should be applied, including the requirement of a quasi-dominant tenement (*e*) and registration. A purchaser would then discover the existence of such licences by ordinary investigation of title. However, the licensees in *Errington* v. *Errington* and *Bendall* v. *McWhirter* being in a different category would not be assisted (*f*).

The passage cited in Denning L.J.'s judgment ([1952] 2 Q.B. at p. 481), from Salmond on Tort (7th ed., p. 290, repeated in 10th ed., p. 246), runs " Such an agreement however, if of such a nature as to be specifically enforceable [amounts to a good equitable servitude—that is to say it] binds and runs with the land in equity so as to be enforceable not merely against the grantor but also against all subsequent owners and occupiers of the land except purchasers for value without notice of any such equitable right." The learned Lord Justice omitted the words in square brackets presumably because he thought they were irrelevant to the main point. It is, however, submitted with respect that the phrase may be material and that on the authorities cited the statement may have to be limited to agreements to create easements or profits à prendre. Salmond cites *Moreland* v. *Richardson* (1856) 25 L.J.Ch. 883; and 22 Beav. 596; (1857) 24 Beav. 33; and *Hervey* v. *Smith* (1856) 22 Beav. 299. The latter case, referred to above (p. 328) is only an example of the enforcement of an agreement for an easement. A orally contracted that his neighbour B might use two flues in A's house which he did for 11 years until C,

(*d*) This would include the right to use Leicester Square instanced by Denning L.J.

(*e*) In *Clore* v. *Theatrical Properties, Ltd.* [1936] 3 All E.R. 483 (discussed below) Romer L.J. held the restrictive covenant cases irrelevant to a pure licence because of the lack of an interest in land to be benefited.

(*f*) Dr. E. O. Walford has suggested (" The Nature and Effect of Licences," 11 Conveyancer (N.S.) at pp. 178–80) that the analogy with negative covenants is bad in principle and that the relevant rules are those concerning easements. " If A grants to B the right to do something in A's land, then B has either a licence or an easement; and it is fallacious to say that a covenant by A to provide facilities for the doing of something on his land is, in effect, a negative covenant because it involves the obligations to refrain from doing anything which would prevent the enjoyment of these facilities." The text above suggests a limitation on this objection. Dr. Walford's article contains a valuable discussion, to which the present writer is indebted, of some of the problems now being considered.

successor in title to A, stopped them up; C was found to have constructive notice by seeing 14 chimney pots but only 12 fireplaces. Sir John Romilly M.R. said (p. 302) " It is true that a right-of-way or other easement cannot be legally granted without some instrument in writing [*sic*] yet where an easement is sold by the owner of the land, and is enjoyed for years, this court would hold that the agreement had been performed in every part except the conveyance, and would not allow it to be recalled by Felton [A] or any person claiming under him, unless he made out that he was a purchaser for value without notice." *Moreland* v. *Richardson*, however, was more complicated. Trustees of a chapel sold plots in a burial ground giving only receipts under hand. Later the defendants, who claimed through a mortgagee of the original trustees, proposed to convert the burial ground to other uses and the plaintiffs, purchasers in possession and enjoyment [so found] of plots, moved for an injunction which they obtained. In interlocutory proceedings (25 L.J.Ch. 883 and 22 Beav. 596) Sir John Romilly M.R. said that the defendants having taken over the mortgage with moneys raised by members of the chapel, were not mortgagees but " trustees of the chapel, if not actually at least in substance and effect " (22 Beav. at p. 602). At the trial of the action he affirmed his interlocutory judgment primarily on the ground that a mortgagee of a burial ground, necessarily having actual or constructive notice of its character, could not turn it to a contrary purpose (24 Beav. 33). Only this part of the two cases really supports the wider proposition. The decision must also be considered as a possible example of an agreement for an easement in gross—both counsel called the right an easement (22 Beav. pp. 559, 600).

(iii) Equity—interest of the Licensee

In *Bendall* v. *McWhirter*, after the passages considered above, Denning L.J. continued ([1952] 2 Q.B. at p. 482), having referred to the *Strathcona Case* (*g*), " It is of course necessary in all these cases that the party who seeks to enforce the contract should have a sufficient interest to warrant the intervention of equity. He must, as the Privy Council put it in the *Strathcona Case*, ' have, and continue to have, an interest in the subject-matter of the contract.' This does not mean he must have a legal estate to be protected. Possession or actual occupation of the land or chattel is sufficient." If the submissions so far made in this article be accepted this becomes the crucial point.

(*g*) [1926] A.C. 108. He said he saw no reason why it should not be followed, at any rate with regard to chattels, as it had been decided by distinguished equity lawyers and was eminently just and reasonable.

As authorities Denning L.J. cited *Errington* v. *Errington* and dicta in *Re Webb* [1951] 1 Ch. 808, distinguishing *King* v. *David Allen & Sons* [1916] 2 A.C. 541, and doubting *Clore* v. *Theatrical Properties, Ltd.* [1936] 3 All E.R. 483. *Errington* v. *Errington* has already been discussed. In *Re Webb* a tenant, after a new lease, challenged an advertisement which had been maintained on the wall of the demised premises for 10 years by the Borough Billposting Co. under contract (*h*) with the landlord. The Court of Appeal held that no reservation of an easement could be implied so that the advertisement was by licence. Some further observations were made. Sir Raymond Evershed M.R. said at p. 821, "Where part of premises granted or demised is subject to an existing and valid tenancy or other agreement, prima facie, no doubt, the grantee or lessee would take subject to and with the benefit of that agreement" adding that if the tenant was to be taken as having licenced the landlord to let the wall, then he could probably only require existing arrangements to be terminated as soon as legitimately possible (*i*). Jenkins L.J. said at p. 831, "the lease must . . . prima facie have taken effect subject to the rights (whatever they may be) of the Borough Billposting Co. under the licence granted to them by the landlord and, as between the landlord and tenant, have passed to the tenant the benefit of the Company's obligations . . . ." These dicta are apparently capable of three meanings (i) the wall was demised to the Billposting Co., so all the tenant got was a lease of the reversion; (ii) the tenant licensed the landlord to make the contract and the normal principle of reasonable notice of revocation was applicable; and (iii) contractual licences bind successors in title with notice—the interpretation preferred by Denning L.J. in *Bendall* v. *McWhirter*. It must be observed, however, that in *Re Webb* the remarks were made without reference to the relevant authorities or argument, on a point not strictly before the court.

In *King* v. *David Allen & Sons*, *supra*, the owner of land promised the licensee advertising rights on the wall of a cinema about to be built by a company about to be formed. This company, though taking the land with notice, refused to permit advertisements. The House of Lords, despite argument that an assignee of land with notice of a licence was bound, held the licence unenforceable because it created only a personal obligation. Nothing was

(*h*) The terms of which were not before the court. The summons asked only for the construction of the lease.

(*i*) Counsel for the tenant had conceded—the reasons do not appear—that his client could not interfere with the contract without liability. The tenant's main object seems to have been pecuniary advantage and to obtain the "rent" due from the Billposting Co.

said one way or the other about executed and executory licences, and the case is clearly open to distinction on this basis.

Clore v. *Theatrical Properties*, however, raises a different issue. There a document granting "front of the house rights" in a theatre, found to create only a licence (*k*) was held not binding upon a purchaser of the theatre with notice (*l*). Lord Wright M.R. said the document was not one creating an estate in land but merely "a personal contract between the parties named therein and is only enforceable among parties between whom there is privity of contract"([1936] 3 All E.R. p. 490), adding "This obligation may be revoked by the covenantor but if he does he will break the conditions and be liable in damages." He did not regard the *Strathcona Case* as relevant or authoritative. Romer L.J., finding only a contract, could think "of no principle of law or equity which will avail the defendants in this case." He held the rules relating to restrictive covenants inapplicable because of the absence of any interest in land to be benefited and the *Strathcona Case* because there the charterer had an equitable interest in the ship itself. The decision is therefore a strong one—that a valuable licence, acted upon, created no interest sufficient to bind a purchaser with notice. In *Bendall* v. *McWhirter* Denning L.J. said ([1952] 2 Q.B. at p. 483) that *Clore's Case* proceeded on the assumption, since invalidated by the *Winter Gardens Case*, that the licensee had no right equity could enforce against the licensor and so "the case may some day have to be reconsidered accordingly."

The validity of this reasoning has been attacked on the ground that the equitable principles had been acted on in *Hurst* v. *Picture Theatres* [1915] 1 K.B. 1, and were in the minds of the judges in *King* v. *Allen* and *Clore* v. *Theatrical Properties*, that these decisions did not turn on the remedy against the licensor but decided that a licence was only a personal permission and not an interest in land and that "decisions in 1946–8 as between the contracting parties cannot affect decisions in 1916 and 1936 that a licence cannot bind third parties" (*m*). On the other hand, the courts did not consider the scope and effect of the decisions (*n*) that executed licences (in the older sense of the word) may bind successors in title with notice in *King* v. *Allen* or *Clore* v.

(*k*) On the earlier authority of *Daly* v. *Edwards* (1900) 83 L.T. 548; and *Frank Warr & Co.* v. *L. C. C.* [1904] 1 K.B. 713.

(*l*) The history of the transactions concerning the theatre and the "front of the house" right was complicated but eventually this was the position.

(*m*) See the article already referred to by Mr. H. W. R. Wade, "Licensees and Third Parties," in 68 L.Q.R., pp. 343–7, where he anticipated the reasoning from some remarks in *Errington* v. *Errington*.

(*n*) *Supra*, at p. 329, *Duke of Beaufort* v. *Patrick*; *Somerset Coal Co.* v. *Harcourt*; *Mold* v. *Wheatcroft*; also *Moreland* v. *Richardson*, *supra*, p. 338.

Theatrical Properties. The latter case has some resemblance to them for dealings had gone on since 1899 on the basis that the licence was effective and the plaintiff was it seems merely taking advantage of his strict legal rights, for in the instrument of sale to him it was stated that the front rights were excluded. Reliance on licences led to the surrender of a protected tenancy in *Foster* v. *Robinson* [1951] 1 K.B. 149, and in *Errington* v. *Errington* to the licensees fixing their home and paying mortgage instalments. The special right of the deserted wife is valuable since it prevents her being rendered homeless in a period of acute shortage of houses.

In short, although the authorities are at present inconclusive, there do seem to be grounds for regarding the interest of a licensee as sufficient in some circumstances to justify its protection by equity against successors in title with notice. More precise definition of the necessary "interest" must be awaited. To make it dependent on possession or full occupation would cause anomaly in circumstances such as those in *Clore* v. *Theatrical Properties* and *Re Webb*. It would seem preferable to limit the principle to licences irrevocable against the licensor (*p*) which have been followed by entry by the licensee (*q*).

In the present indeterminate state of the authorities the wider aspects of the problem are relevant in considering how the law may or should develop. The creation of a new interest in land inevitably involves uncertainty and practical conveyancing difficulties. Comment and criticism have been directed to this point (*r*). At the same time it is felt that attention may also fairly be directed to the anomalies, hardship and opportunities for sharp practice that will exist if the present new and wide range of licences, specifically enforceable against the licensor, are of no effect against successors in title. From this point of view *Errington* v. *Errington* and *Bendall* v. *McWhirter* may be regarded as an inevitable development from the *Winter Gardens Case* and *Booker* v. *Palmer* (*s*) rather than as a new departure. Equity should be slow to create new interests in land but on the other hand not reluctant to remedy

(*p*) *The Winter Gardens Case* shows that irrevocability will not be implied very readily.

(*q*) Possibly the words "to his detriment" should be added, though they add an indefinite quality to the proposition. The principles applicable to licensees and third parties invite comparison with that enunciated in *Central London Property Trust* v. *High Trees House, Ltd.* [1947] 1 K.B. 130, and *Combe* v. *Combe* [1951] 2 K.B. 215. The licensee's interest, however, will presumably be available not only as a shield but also as a sword.

(*r*) See, for example, the article already referred to, by Mr. H. W. R. Wade and Mr. R. E. Megarry, "The Deserted Wife's Right to Occupy the Matrimonial Home," 68 L.Q.R. pp. 379–90.

(*s*) [1942] 2 All E.R. 674—the starting point of the doctrine that a licensee may have exclusive possession.

substantial injustice. Space does not permit further elaboration of arguments on these lines and in any case opinions will differ on their respective merits.

5.—Equitable Contractual Licences and the 1925 Legislation

(1) Licences as Equitable Interests in Land within the 1925 Legislation

It has already been suggested (*ante*, p. 333) that section 1 of the Law of Property Act, 1925, may well prevent licences from subsisting at law unless they are for interests equivalent to a fee simple or term of years absolute. Neither can licences as equitable interests in land be readily fitted into the scheme of the 1925 legislation. Equitable interests in land can only be created where a valid equivalent interest in real or personal property could have existed before 1926 (L. P. A., 1925, s. 4 (1)). The *Strathcona Case* [1926] A.C. 108, is perhaps the answer to this point—the right could exist in personalty. Acting upon the licence will, it seems, amount to part performance so as to render irrelevant section 40 of the Law of Property Act, 1925. But all rights and interests in land may be disposed of (L. P. A., 1925, s. 4 (2)) whereas the benefit of licences may be unassignable (*t*). Further, apart from some exceptions of pre-1926 interests which do not affect the argument, the Acts appear to contemplate that after 1925 all equitable interests shall be either overreachable by a special trust for sale or settlement (*u*) or be registrable (L. P. A., 1925, s. 2; S. L. A., 1925, s. 21; L. C. A., 1925, ss. 10, 13). Can it then be said that unless a licence falls within the scheme it cannot subsist as an equitable interest in land and so cannot be enforced against third parties? Alternatively, if it be enforceable against third parties does that necessarily invest it with all the attributes of equitable interests according to the Acts? To answer either question in the affirmative involves two propositions; first, that by being enforceable against third parties a licence becomes an interest in land not only in general parlance but also in every sense in which that expression is used in the Acts and second, that the Acts lay down a complete and immutable code of real property law. The latter contention was rejected by the Court of Appeal in *Lewisham Borough Council* v. *Maloney* [1948] 1 K.B. 50, at pp. 53, 56, where they preferred to regard the Acts as concerned primarily with the simplification of title and conveyancing. It is suggested that neither proposition is justified and that consequently the problems

(*t*) See *Errington* v. *Errington* [1952] 1 K.B. at pp. 293, 298, 301; *Bendall* v. *McWhirter* [1952] 2 Q.B. at p. 477.

(*u*) Where the trustees are either approved by the court or a trust corporation.

raised by licences are only troublesome examples of the difficulties that occur where legislation has to be applied in circumstances not foreseen by the draftsman (*a*).

On this basis the assignability of licences must, it seems, depend on the nature of the particular licence. Probably most licences involving full occupation or possession will be personal in character (*b*), but the benefit of commercial licences—such as the advertising arrangements in *Re Webb*, *supra*—ought to be assignable. Despite the comprehensive wording of the relevant sections (L. P. A., 1925, s. 2 (2); S. L. A., 1925, s. 21 (1)) it does not seem that the courts would ever hold that a licence could be overreached by a trust for sale or settlement (*c*). Therefore the major problem is to determine whether licences need registration.

(2) Possession as an Alternative to Registration

Registration under the Land Charges Act, 1925, clearly does not of itself create rights but merely ensures that rights otherwise effective shall not be void against a limited class of successors in title (L. P. A., 1925, s. 199; L. C. A., 1925, s. 13). Section 70 of the Land Registration Act, 1925, has, it is submitted, a like effect, for it provides that registered land is " deemed to be subject to such of the following interests as may for the time being be subsisting." Thus the rights of persons in the process of acquiring title under the Limitation Act, 1939, are overriding interests, but any successor in title may eject a squatter who has not been in possession for the necessary period.

The first problem, therefore, is whether the taking of possession or acting upon a licence is an alternative to registration. In *Bendall* v. *McWhirter* Denning L.J. said ([1952] 2 Q.B. at p. 483), " no such questions [of registration] arise where the licensee is in possession or actual occupation of the land, because that itself is sufficient notice of his rights : see section 14 of the Law of Property Act, 1925, section 70 (1) (g) of the Land Registration Act, 1925, and *Lewisham Borough Council* v. *Maloney*. Statutory tenants (who have only a personal privilege) and requisitioning authorities

(*a*) *Lewisham Borough Council* v. *Maloney* was such a case; there the rights of the requisitioning authority were created by statute, and the licence cases could of course be distinguished on that basis.

(*b*) The deserted wife's right is personal—*Bendall* v. *McWhirter*. The licences in *Errington* v. *Errington*, *Foster* v. *Robinson*, *Marcroft Wagons* v. *Smith*, and *Cobb* v. *Lane* all seem to have been personal to the licensee. Indeed it may often be that unless such a personal element exists the court will have difficulty in finding a licence rather than a tenancy, if any payment is involved.

(*c*) The comparison in *Bendall* v. *McWhirter* (at pp. 483, 487) between licences and liens, clogs or fetters must not be carried too far; Wolstenholme and Cherry say that salvage and executors' liens are overreachable—Conveyancing Statutes, 12th ed., p. 235.

(who have only possession) do not have to register their interests, nor does a contractual licensee so long as he is in possession or actual occupation." It is submitted with respect that the interests of statutory tenants and requisitioning authorities are not registrable because the Land Charges Act, 1925, does not comprehend them, and that *Lewisham B. C.* v. *Maloney*, *supra*, proceeded on this ground. If this be so these matters must be deemed irrelevant to the different question of whether the taking of possession under a prima facie registrable agreement makes registration unnecessary.

(a) *Unregistered conveyancing*

Section 14 of the Law of Property Act, 1925, provides that Part I of the Act (sections 1–39) shall not prejudicially affect any interest to which a person may be entitled by actual possession or occupation. It is difficult to see that this section should be held to place very severe limitations on sections 198 and 199 of the Act and the Land Charges Act, 1925. Further it has now been held (in both cases by Harman J.) in *Coventry Permanent Economic Building Society* v. *Jones* [1951] 1 All E.R. 901, and *Hollington Bros.* v. *Rhodes* [1951] 2 All E.R. 578, that possession under an estate contract does not obviate the need for registration. Writing in the Conveyancer (Vol. 15 (N.S.) at pp. 381 et seq., "Tenants in Possession and Third Parties") Mr. G. Boughen Graham argues that possession is a "matter or fact or thing" within section 199 (ii) of the Law of Property Act, 1925, so that a person who can rely solely on the fact of possession without producing any agreement can escape the effect of the above cases. Mr. Graham suggests that equity might on this basis, following the law, recognise an "equitable periodic tenancy" in a person who obtained possession from an equitable owner and paid a periodic rent. Even if this be true of intended tenancies (*d*) the reasoning does not seem applicable to licences, for there is no relevant rule of law to be followed. Without relying on his agreement a licensee can prove no more than the fact of possession, which is insufficient against a person with title (*Delaney* v. *Smith* [1946] 1 K.B. 393). It is therefore submitted that in unregistered conveyancing possession is not an alternative to registration, at any rate so far as licences are concerned. This conclusion has the advantage of obviating any further inquiry as to whether acting upon a licence (*e.g.*, to post advertisements, to exercise "front rights" in a theatre) not conferring

(*d*) Mr. Graham was considering the problem of tenancies by estoppel and mortgages. In *City Building Society* v. *Miller* [1952] 2 All E.R. 621 (decided after Mr. Graham's article was written) Evershed M.R. did not accept the idea of an equitable term (p. 625) though there the tenant was not in occupation.

possession or occupation would be equally effective in giving notice to a purchaser.

(b) *Registered conveyancing*

Here the problem is more complicated. The Court of Appeal has recently held in *City Building Society* v. *Miller* [1952] 2 All E.R. 621 that the definition of a lease as including an agreement for a lease in section 3 (x) of the Land Registration Act does not make an executory agreement for a lease an overriding interest within section 70 (1) (k) because the use in the latter subsection of the word "granted" shows it was intended to be confined to legal terms. Evershed M.R. pointed out (*e*), in support of the construction, that section 23 of the Land Charges Act excepted from that Act matters required to be protected under the Land Registration Act, while section 59 of the Land Registration Act required the protection by notice or caution of matters registrable under the Land Charges Act, adding "If it is not so capable of protection under the Land Registration Act, it continues to be covered under the Land Charges Act. In other words, it is quite plain that the Land Charges Act is not wholly excluded *quoad* registered land."

It is not clear, however, whether this requirement of protection applies to agreements under which possession has been taken. In *City Building Society* v. *Miller*, *supra*, Jenkins L.J. said (at p. 628) that the availability of registration of a caution gave protection to a person "holding an agreement for a lease who has not entered into occupation so as to qualify for the protection afforded by section 70 (1) (g) of the Land Registration Act," while in *Woolwich Equitable Building Society* v. *Marshall* [1951] 2 All E.R. 769, Danckwerts J. held that occupancy by a prospective tenant prior to a mortgage did create an overriding interest. He said (p. 773), "by reason of the occupancy he was the owner of an overriding interest in a manner similar to the old rule that the fact that persons are in possession put the purchaser on inquiry, and the rights of the building society are subject to his overriding interest and to the rights (whatever they may be) that he has." Section 70 (1) (g) may therefore be more potent than section 70 (1) (k). But since section 70 (1) (g) refers only to the rights of persons in possession or occupation it will apply to only a limited class of licences unless the word "occupation" is generously construed. Further, the rules for unregistered and registered conveyancing will be different if the submissions in the preceding subparagraph are correct. One may perhaps express the hope that it will eventually be held that registration under the Land Charges

(*e*) At p. 626. Jenkins and Hodson L.JJ. agreed with this approach.

Act or protection on the register under the Land Registration Act is the only method of fixing purchasers with notice of matters capable of such registration or protection, whether or not possession has been taken.

(3) Whether Equitable Licences require Registration or Protection under the Land Charges Act and Land Registration Act

It has already been submitted that some licences effective against successors in title should be classified as estate contracts or restrictive covenants. It follows that these should be registered or protected, subject to what has been said above about the possible effect of taking possession. The residue of licences—the majority—do not fall within these groups and therefore must either be classifiable as equitable easements or not be registrable at all. In *Lewisham B. C.* v. *Maloney*, *supra*, the Court of Appeal regarded the words "easement right or privilege over or affecting land" (L. C. A., 1925, s. 10, Class C (ii)) as having a restricted meaning *ejusdem generis* with the word easement.

In an article "Equitable Easements" in 15 Bell Yard (*f*) Mr. Geoffrey Cross has pointed out that it is generally agreed that an easement may be equitable either by reason of informal creation or because it does not exist for an interest equivalent to a fee simple or term of years absolute, but that whether a dominant tenement may be absent is doubtful. Mr. Cross' own view appeared to be that a dominant tenement should not be necessary but would probably be held so. It is impossible to be dogmatic but it is suggested that unless there is such a dominant tenement a licence will not be classified as an equitable easement. In that case many licences will not be registrable. If the land is registered there is the complication that section 70 (1) (a) of the Land Registration Act includes as overriding interests "other easements not being equitable easements required to be protected on the register," but Brickdale and Wallace on the Land Registration Act (4th ed., p. 192) say there is no such requirement. This may mean that the Land Charges Act applies—*City Building Society* v. *Miller*, *supra*—to licences classifiable as equitable easements.

6.—Licences Coupled with Grants

These must be considered briefly. Since the decision in *Webb* v. *Paternoster* (*g*) the rule that a licence coupled with a grant is irrevocable has been accepted as part of our law but there has never

(*f*) Referred to with approval by Denning L.J. in *Bendall* v. *McWhirter* ([1952] 2 Q.B. at p. 481) where he regarded it as referable only to executory agreement.

(*g*) (1618) Palmer 71.

been a satisfactory definition of the grant required. There has been much confusion with profits à prendre in gross, particularly where the latter have been created by documents conferring licences to get and powers to take away (*Muskett* v. *Hill* (1835) 5 Bing. N.C. 694; *Wickham* v. *Hawker* (1840) 7 M. & W. 63). A personal licence coupled with a grant (*e.g.*, to fish and keep what is caught) may still be possible, but such an arrangement is today likely to be construed as merely contractual (*Re Vicker's Lease* [1947] Ch. 420). Theoretically any proprietary interest in land should be sufficient to support an irrevocable licence (*h*) but this would make nonsense of the rule that an easement must be capable of lying in grant. A *jus spatiandi* will not, it is submitted, be allowed to exist as an irrevocable licence coupled with a grant of a fee simple or term of years, though such a right might be created as a contractual licence effective against successors in title.

However, sales of crops or timber, whether interests in land or chattels, would seem able to support irrevocable licences to enter to cut or take away, so that transfer of any chattel remaining on the transferor's land may give the transferee the right to get it (*Jones* v. *Earl of Tankerville* [1909] 2 Ch. 440; *Wood* v. *Manley* (1839) 11 A. & E. 34; *Ellis* v. *Noakes* [1932] 2 Ch. 98). Presumably in these cases the transferee could enforce his rights against successors in title.

It is submitted, further, that any grant supporting an irrevocable licence must be of a recognised interest in property, and that the mere enjoyment of the licence cannot of itself be a grant. *Hurst* v. *Picture Theatres, Ltd.* [1915] 1 K.B. 1 is on this view supportable only on a contractual basis.

7.—Practical Problems in Conveyancing

Till there has been further judicial elucidation of the problem it is prudent to assume that irrevocable contractual licences, where the licensee is in possession or occupation or has acted on the licence so far as its nature permits, bind successors in title other than purchasers for value without notice but are not registrable. In registered conveyancing they may be promoted to overriding interests. How then can a purchaser or mortgagee be sure no such licence exists? The only accurate reply is probably that he cannot, but it may be observed that the problem is not essentially different from that facing him with regard to legal easements and profits à prendre. Similar inquiries and requisitions should be made. Some tentative suggestions may be put forward :—

(*h*) It seems that a profit à prendre may support an easement—*Hanbury* v. *Jenkins* [1901] 2 Ch. 401.

(a) Insistence on vacant possession on completion, plus an especially careful inspection of the premises if advertisements, etc., are likely to exist on them (*i*), should solve many of the difficulties of purchasers. A licensee who gives up possession should be regarded either as surrendering his or her licence or estopped from asserting it against the purchaser. Section 70 (1) (g) of the Land Registration Act, 1925, excepts the case where inquiry is made of the person in occupation and the rights are not disclosed. Licences conferring only limited rights may not be easy of discovery but, as in the *Winter Gardens Case*, the courts may not be ready to hold these irrevocable unless the agreement plainly says so—licensees will insert such a clause now, no doubt, but a licensor with an eye to a future sale need not accept it. If the property is subject to a tenancy, presumably a tenant's licensee cannot be better off than his licensor and must observe the conditions of tenancy. The normal rules as to misrepresentation, misdescription and non-disclosure would seem applicable between vendor and purchaser.

(b) A mortgagee lending money to enable a purchase to be made seems to stand in the same position as the purchaser/mortgagor as regards pre-existing licences. The rules determining the validity of leases made by mortgagors should, it is suggested, be held applicable to licences also, provided the mortgage excludes the power of making irrevocable licences without the consent of the mortgagee (*k*). Some such clause may be worth inserting. If the wife's irrevocable licence dates only from her husband's desertion the principle could also be applied to her. Even if her husband deserts her at the moment of the move into possession or if she has an irrevocable licence in the old matrimonial home, presumably she has no licence in the new one till she is in actual occupation. On this basis mortgagees should take their mortgage before the borrower moves in—compare the tenancy cases on "feeding the estoppel" (*l*). If the holder of such subsequent licences invalid against the mortgagee were then held to have an equitable right to redeem it is suggested that justice would be done.

(c) The outstanding problem is then the mortgage given not on a purchase but during a period of ownership. Here careful investigation to find out exactly who is in occupation, and whether the prospective mortgagee's wife claims an existing irrevocable licence, seems necessary.

(*i*) It may be that solicitors should themselves inspect more often. The need is for inspection by someone able to make the appropriate legal deductions from the facts.

(*k*) Or, of making any licences requiring more than, say, 14 days' notice of revocation. The power of licensing cannot be excluded *simpliciter*, or the mortgagor could never entertain a guest!

(*l*) *Universal Permanent Building Society* v. *Cooke* [1952] Ch. 95 and cases cited.

HOWE *v.* LORD DARTMOUTH RE-EXAMINED

By L. A. Sheridan, Barrister-at-Law

I

Howe v. *Lord Dartmouth* (*a*) has been taken at different times to decide many things. For example, Lawrence J., in *Re Brooker* (*b*), implicitly stated that it governed the apportionment that must be made between tenant for life and remainderman where trustees for sale postponed conversion. Again, in *Re Trollope's Will Trusts* (*c*), both counsel and Tomlin J. accepted this point of view, the court applying the "rule in *Howe* v. *Lord Dartmouth*" to the situation arising where express trustees for sale exercised their power of postponement. And Clauson L.J., in *Re Berton* (*d*), held that *Re Brooker* should be followed to exclude the effect of *Howe* v. *Lord Dartmouth* on a statutory trust for sale of leaseholds. This is to mention by name a decision which is one instance of a principle to support a proposition relating to another instance of the same principle. The result is to create uncertainty whether a ruling that one branch of the principle does not apply to a given set of circumstances includes a ruling that the principle itself is inapplicable in such cases. A view opposed to that expressed in these decisions is that, as the only effect of *Howe* v. *Lord Dartmouth* is to give rise to an implied trust for sale in certain circumstances, this case can never be relevant to an express or statutory trust for sale, and that there has been a confusion between the rule in *Howe* v. *Lord Dartmouth* and the principle on which it is based (*e*). More recently, in *Re Parry* (*f*), Romer J. referred to the "rule in *Howe* v. *Lord Dartmouth* or the corresponding rule where there is a trust for sale." This is an admission that *Howe* v. *Lord Dartmouth* is not directly applicable to an express trust for sale; however, there is still a confusion between a rule creating an implied trust for sale and a rule governing apportionment pending sale. This is the result of failure to keep the actual

(*a*) (1802) 7 Ves. 137.
(*b*) [1926] W.N. 93.
(*c*) [1927] 1 Ch. 596.
(*d*) [1939] Ch. 200.
(*e*) See H. G. Hanbury, Modern Equity, 5th ed., pp. 262–3; G. W. Keeton, Law of Trusts, 3rd ed., pp. 260–1; J. A. Nathan, Equity through the Cases, 1st ed., pp. 234, 248–9.
(*f*) [1947] Ch. 23, at p. 28.

decision in *Howe* v. *Lord Dartmouth* distinct from the broader principle of which it is part.

The question then arises of what *Howe* v. *Lord Dartmouth* did decide. It is well known that no detailed rules for dealing with a residuary fund of personalty left to persons in succession and consisting of wasting, hazardous, unauthorised or non-income producing property were laid down. These rules were nineteenth century elaboration, and the rules for apportionment are sometimes referred to (*g*) as "corollaries" of the rule in *Howe* v. *Lord Dartmouth*. But the principle that a trustee must hold an even hand amongst all his beneficiaries, though not necessarily thought to be born of it, is regarded (*h*) as substantially resting on that case. Lord Eldon did not enunciate such a principle in so many words, though he did say (*i*): "As in the one case that, in which the tenant for life has too great an interest, is melted for the benefit of the rest, in the other that, of which, if it remained in specie, he might never receive anything, is brought in; and he has immediately the interest of its present worth." One may well ask, can this possibly be the first time such a case arose and was decided in this way? If not, why has this decision become so celebrated?

II

Lord Cottenham would dispose of the whole burden of this article in these words (*k*): "All that *Howe* v. *Lord Dartmouth* decided—and that was not the first decision to the same effect—is that, where the residue or bulk of the property is left *en masse*, and it is given to several persons in succession as tenants for life and remaindermen, it is the duty of the court to carry into effect the apparent intention of the testator." While this errs on the right side of not attributing more to a case than was in it, it is too simple a dismissal of the matter.

It is convenient, before proceeding further, to set out the material facts of *Howe* v. *Lord Dartmouth*. The Earl of Strafford, by his will, dated 1774, gave all his residuary estate, real and personal, to his wife for life, remainder to his sister, Lady Anne Conolly, for life, with various remainders over. Strafford died in March 1791, his wife having predeceased him. Lady Anne, who was therefore the

(*g*) See Hanbury, *op. cit.*, pp. 260–1; Nathan, *op. cit.*, p. 233.

(*h*) Hanbury, *op. cit.*, p. 251, states: "In the ordinary case, where he is holding property on trust for several beneficiaries in succession, [the trustee] is under the very important duty of acting impartially between them; this duty is enshrined in one of the most important decisions in the whole history of equity, *Howe* v. *Earl of Dartmouth*."

(*i*) 7 Ves. 148.

(*k*) *Pickering* v. *Pickering* (1839) 4 My. & Cr. 289, at p. 298.

tenant for life, quickly filed a bill for an account of the personal estate. By a decree, made at the Rolls in May, 1793, the usual accounts were directed, and it was declared that the plaintiff was entitled to the interest on the residue of the personal estate for her life.

The Master's report, of March, 1796, stated the account of the personal estate, amongst which were £4,320 Bank Stock, £9,572 per annum long annuities, and £750 per annum short annuities. Under orders made in the cause, the sums of £15,000 and £4,000 had been paid in by the executors and laid out in 3 per cent. Consolidated Bank Annuities.

A decretal order of May, 1796, laid down (inter alia) a process for the sale of the Bank Stock and long and short annuities, and investment of the proceeds in 3 per cent. annuities. The Master's further report of December, 1796, stated that this had been accomplished.

On the death of Lady Anne, the suit was revived, and one of the remaindermen insisted that Lady Anne had received large sums more than she was entitled to, owing to the lapse of over five years between the death of the testator and the sale of the wasting personalty. Lord Alvanley M.R. directed inquiries with reference to that question and granted liberty to present a petition for the rehearing of the 1796 order as to this matter.

Lord Rosslyn sat on the petition for rehearing, but went out of office before giving judgment. Accordingly, the petition was argued anew before Lord Eldon, and this gave rise to the reported decision (*l*).

The points covered by Lord Eldon can be tabulated thus—

(1) A residuary gift of personalty is not specific merely because it is part, with realty, of a mixed fund (*m*).

(2) If personalty is given to persons in succession, and not given with a clear indication that it is to be specifically "enjoyed," the intention of the testator must be effectuated by putting the property in such a state that it will in fact be enjoyable by all those persons (*n*).

(3) This is to be done by selling the assets which are wasting, unauthorised, hazardous, or non-income producing, and investing the proceeds in the 3 per cents (*o*).

(*l*) This is a summary of the facts relevant to this article. There is a fuller exposition in 7 Ves. 137–40.

(*m*) 7 Ves. 147.

(*n*) 7 Ves. 148.

(*o*) 7 Ves. 148. The "three per cents." signified Government annuities bearing 3 per cent. interest in perpetuity, which were then the appropriate investment for trust funds. Any authorised security will do.

(4) A court order is not needed before this can be done (*p*).
(5) These provisions do not apply to real securities (*q*).
(6) Conversion is to take effect as from the time when the property first could be converted (*r*).

III

The next step is to take each of these propositions and examine Lord Cottenham's suggestion that there is an earlier decision *in pari materia*.

(1) *Non-specific character of personalty in mixed residuary fund.*

Before the Wills Act, 1837, was passed, all (including residuary) devises were specific, but this was not true of legacies: there are many old authorities to that effect (*s*). The first question in *Howe* v. *Lord Dartmouth* was whether the whole of a mixed testamentary gift of residuary realty and personalty was specific. Lord Eldon regarded this as the crux of the matter: "No question arises upon this will, except, whether this was a specific bequest of such personal estate as was the testator's at the time of his death" (*t*). Counsel for the defence argued, but weakly, that the gift was specific and the Lord Chancellor found no difficulty in disposing of this argument without hearing plaintiff's counsel in reply. The decision was merely that there was nothing in the will to make the gift specific. It was no novelty to hold that a residuary gift of personalty was not specific by virtue of being part of a mixed fund. In *Hartley* v. *Hurle* (*u*), it was said, almost casually: "The residuary clause in this will is not a specific gift at all . . . It is not merely personal estate, but the rest and residue of his real and personal estate not otherwise given." No new principle was laid down by *Howe* v. *Lord Dartmouth* in this connection; but even if it had been, the case would not be remembered for that, as the point has no practical value today.

(2) and (3) *Conversion of wasting, hazardous, unauthorised and non-income producing assets and investment of the proceeds*

The second and third propositions go together. One states what must be done and the other how this is to be effected. That there was nothing new in the idea of converting wasting securities is shown by the fact that, before the arising of the dispute which resulted in

(*p*) 7 Ves. 150.
(*q*) 7 Ves. 150.
(*r*) 7 Ves. 152.
(*s*) See, *e.g.*, *Brydges* v. *Duchess of Chandos* (1794) 2 Ves.Jun. 417, 427.
(*t*) 7 Ves. 147.
(*u*) (1800) 5 Ves. 540, at p. 545.

the reported decision, there had already been an order of the court in 1796 for the sale of residuary personalty of a wasting nature, and for the purchase of 3 per cents. with the proceeds. On the death of the tenant for life the new dispute arose because she, it was alleged, had received more than she would have done "if those funds had been sold, as they ought to have been, immediately after the testator's decease, and the produce invested in the 3 *per cents.*" (*a*). Counsel for the plaintiff urged strongly that it was the ordinary practice for wasting assets to be converted: ". . . there is a standing rule of the court, for the benefit of all parties interested, that those funds shall be laid out in the more equal fund, the 3 *per cents.*" (*b*). And again: "Under every such will the court has always sold this sort of property; . . . This is to be found in every decree; and is so familiar, that no report of such a case is to be met with in print" (*c*). Defendant's counsel did not attempt to refute this, but argued: "The court makes the conversion, but does not consider the executor as having done wrong in not having converted" (*d*). Lord Eldon also took the view that a court order was usual in these cases. The purposes for which the property was given, as he said, were those for which it was admitted that there was a general rule that those perishable funds were to be converted in such a way as to produce capital, bearing interest. "I was astonished," he exclaimed (*e*), "when that was doubted, from general recollection."

From all this it cannot be questioned that whenever a disposition containing assets of the kind mentioned came before the court, a conversion was ordered. For further proof, it is sufficient to note that counsel was not quite accurate in saying that no report of such a case was to be met with in print before *Howe* v. *Lord Dartmouth*, for there were some (*f*).

(4) *An order of the court is not necessary*

Counsel for the defence in *Howe* v. *Lord Dartmouth* regarded the fourth point as the vital part of the case. He did not agree that the executor was in any case bound to convert: "The habit is to do it,

(*a*) 7 Ves. 140.
(*b*) 7 Ves. 141.
(*c*) 7 Ves. 141.
(*d*) 7 Ves. 145.
(*e*) 7 Ves. 149.
(*f*) *Powell* v. *Cleaver* (1788) 2 Bro.C.C. 499; and *Cranch* v. *Cranch* (1797) 7 Ves. 152 are examples, and were in fact cited in argument (7 Ves. 141) in *Howe* v. *Lord Dartmouth*. Many other cases, in which similar decrees were made, existed but were unreported, presumably because they were so common. The following examples are quoted as footnotes to the report of *Howe* v. *Lord Dartmouth*, 7 Ves. 152: *Re Hoadley*; *Chancey* v. *Rees*; *Peppin* v. *Lovewell*; *Dagley* v. *Leake*; *Griffiths* v. *Grieve*; and *Bartholemon* v. *Scholey*.

when the executor is called into this court, not when he is not called upon and no question is raised" (*g*). The Lord Chancellor took little notice of this point, beyond remarking that "Lord Kenyon, who was a repository of valuable knowledge, produced a dictum of Lord Northington, that the court would protect an executor in doing what it would order him to do." (*h*). It is true that to protect an executor in doing something is not to attack him for omitting to do it; but it is futile to insist that you need not do off your own bat what anyone interested could at any time call upon the court to order you to do. Therefore, it is submitted that even before *Howe* v. *Lord Dartmouth* was decided, an executor must have known this duty. This is implicit in *Maxwell* v. *Wettenhall* (*i*), where it was resolved: "Thirdly, if a legacy be given charged upon a dry reversion, here it shall carry interest only from a year after the death, a year being a convenient time for a sale." Thus it was recognised that, first, a legacy carried interest; secondly, that a legacy of non-income producing property was no exception; that therefore, in the later words of Lord Eldon, "future interests are, for the sake of the tenant for life, to be converted into a present interest, being sold immediately, in order to yield an immediate interest to the tenant for life" (*k*). *Maxwell* v. *Wettenhall* presupposes that the executor must sell in such a case, and decides only the time limit within which he must do so.

Maxwell v. *Wettenhall* was not considered in *Howe* v. *Lord Dartmouth*, but counsel for the plaintiff quoted *Holder* v. *Holder* (*l*), where "an account was directed of all the excess that had been received of short annuities, beyond four per cent" (*m*). It is not recorded whether the executor had previously been ordered to sell these annuities.

It is true that no previous case lays down as a rule the executor's duty to sell in these cases, and so *Howe* v. *Lord Dartmouth* may properly be regarded as the primary authority on this point. This is probably because the argument to the contrary had never previously been directly in point. Also, as administration of estates by the court was usual in those days, it is likely that an order of the court would be made without the executor having to consider how he should act in the absence of such an order.

Apportionment, furthermore, was not a new process in 1802, as is

(*g*) 7 Ves. 144–5.
(*h*) 7 Ves. 150.
(*i*) (1722) 2 P.Wms. 26.
(*k*) 7 Ves. 148.
(*l*) In Chancery, May, 1798.
(*m*) 7 Ves. 146–7.

shown by Lord Eldon's reference to " the ordinary rule of apportioning " annuities as between the assets already converted and those awaiting sale (*n*). Much earlier, in *Bird* v. *Lockey* (*o*), a mathematical calculation strikingly similar to that in *Re Earl of Chesterfield's Trusts* (*p*) was applied, though in a different context. In *Gibson* v. *Bott* (*q*) apportionment was ordered where express trustees for sale could not sell.

(5) *Exception as to real securities*

That the rules did not apply to real securities was well established: the Lord Chancellor, without quoting any authority, accepted this as settled law and did no more than indicate the reason (*r*). In fact, in *Cranch* v. *Cranch* (*s*), it was held that the exception included leaseholds, which would not be sold without inquiry whether this was for the benefit of the person entitled to the residue of personal estate.

(6) *Time of conversion*

The reasoning that an executor was bound to convert in appropriate cases is supported by Lord Eldon's decision on the sixth issue. Indeed, the question of the date from which conversion should take effect was the only one raised by the petition for rehearing. Some definite time had to be fixed by the court. There were obvious reasons against taking the date of the decree, even where one was sought, as Lord Eldon pointed out. " If the principle is that the court, when its observation is thrown upon it, will order the conversion, it ought to be considered to all practicable purposes as

(*n*) 7 Ves. 149.

(*o*) (1716) 2 Vern. 743. In this case, S bequeathed £1,200 to A, B, C and D, the four children of J. L., to be divided amongst them according to the discretion of J. L., whom S made executor; and S willed that J. L. should not be compelled to pay any of the legacies within a year after the testator's death. A died before the testator. B died within six months after the testator and before any allotment or distribution. J. L. later paid to C £900 and took a receipt from C in full of his share of the £1,200. By his will, J. L. gave £400 to D in full of his share.

The testator had died in 1697. The payment of £900 was in 1708. J. L. died several years later.

J. L., the father, having had a receipt for the £900 given to his son, who died in J. L.'s lifetime, C's representatives could claim nothing more. Accordingly the remainder of the £1,200 belonged to the plaintiff, the other surviving child.

It was resolved: " Fourthly, that the father ought to answer interest for the £1,200 from the end of a year after the testator's death . . . but the Master in computing of the interest was to take out of the principal so much, as with the interest of it, would make up £900, when it was paid to the son in 1708, and then to carry interest for the remaining principal, from the end of the year after the testator's death; and decreed such principal with single interest to be paid the plaintiff."

(*p*) (1883) 24 Ch.D. 643.

(*q*) (1802) 7 Ves. 90.

(*r*) 7 Ves. 150.

(*s*) (1797) 7 Ves. 152.

converted, when it could be first converted " (*t*). This is decided for the first time in *Howe* v. *Lord Dartmouth*.

It is apparent, then, that some points were resolved for the first time in *Howe* v. *Lord Dartmouth*. It is equally clear that a principle of impartiality on the part of a trustee had existed for a long time beforehand. Why, then, did the case become a celebrated authority for the principle as well as for its own particular application of it? *Howe* v. *Lord Dartmouth* certainly is the first reported comprehensive treatment of the subject. That the legal profession lacked reports is indicated by the fact that the cases cited in *Howe* v. *Lord Dartmouth* were then recent decisions, suggesting citation from memory.

There is no evidence that *Howe* v. *Lord Dartmouth* was regarded at the time as an important development. One can only assume, therefore, that practitioners seized on the case as a great authority because of Lord Eldon's usual thoroughness in dealing with the matter, and the reporter's competence.

Quoting *Howe* v. *Lord Dartmouth* not only to support the principle, but also as an authority for apportionment, that other important branch of the same principle, seems to be an even more recent fault, but its source is obscure (*u*).

IV

Leading cases are not necessarily first cases. The citation of *Howe* v. *Lord Dartmouth* to support any or all of the six enumerated rules is unobjectionable. The purpose of this re-examination is not to disparage such use of the case, but to focus attention on a misconception resulting from the promiscuous citation of it in connection with any rule relating to the duty of a trustee to hold an even hand amongst all his beneficiaries; in the hope that, if in future the distinctions drawn by this article are accepted, doubts may be removed as to whether a rule or a principle is under discussion, and that the true scope of the decision may be apparent.

The mistake is that a fundamental principle originates in *Howe* v. *Lord Dartmouth*. This case is not the source whence many detailed rules flow. Rather is it one tributary to the main stream of the

(*t*) 7 Ves. 151.

(*u*) Jarman on Wills did not mention *Howe* v. *Lord Dartmouth* in any other connection than the matters decided in it as late as the 3rd ed. by E. P. Wolstenholme and S. Vincent in 1861. The same is true of H. S. Theobald, Law of Wills, 7th ed. (1908), and the 11th ed. of Sir E. V. Williams' Law of Executors and Administrators by S. E. Williams in 1921. However, in the 5th ed. of Jarman by L. G. G. Robbins in 1893, at p. 577, *Howe* v. *Lord Dartmouth* is quoted as authority for the principle which gives rise to apportionment. Sir A. Underhill goes the farthest in his Law of Trusts and Trustees, 8th ed. (1926), p. 246, by referring to apportionment as " the second part of the rule in *Howe* v. *Lord Dartmouth*."

general principle whose source is lost in the obscurity of early equity. *Howe* v. *Lord Dartmouth* was conscious of the existence of a principle, as were many of the previous cases. Some earlier decisions went even further, as did *Gibson* v. *Bott* (*a*), which, as has been pointed out, (*b*) is the real authority for saying that the so-called corollaries of *Howe* v. *Lord Dartmouth* apply to express trusts for sale. Indeed, the rule that non-income producing personalty settled by will must be sold—a manifestation of the broader principle—ought to be at least as old as the rule that a legacy carries interest as from one year after the death; and that rule, as was pointed out in *Beckford* v. *Tobin* (*c*), is much older than the Statute of Distributions, 1670.

Not only the decisions, but the very words of earlier cases on a variety of topics demonstrate the existence of the principle which inspired the decision in *Howe* v. *Lord Dartmouth*. Thus, in *Sitwell* v. *Bernard* (*d*), the learned judge, in deciding a point of construction of a testamentary trust for sale and investment of the proceeds in land to be settled, said: "I am therefore disposed to say, that justice requires, that the tenant for life should have the interest from the end of the year; and the more so, because I am clear, that distributing that justice to him is consulting the essential interests of the persons in remainder; for then from his death they will have the benefit of that, whether the fund is converted into land or not; and if that is not done, the rule may press as hard upon them; and some of them may have no actual enjoyment of the money."

Therefore, it can be said that there is a principle that a trustee must act impartially towards the beneficiaries: this is much more than a century and a half old. *Howe* v. *Lord Dartmouth* collects and enunciates the rules relating to one set of circumstances governed by the general principle. It is essential, when approaching a problem of the modern law on this subject, to keep separate (1) the principle of which *Howe* v. *Lord Dartmouth* is an illustration and (2) the rule in *Howe* v. *Lord Dartmouth*.

Failure to appreciate this distinction has led to the confused terminology of *Re Brooker* (*e*) and certain subsequent cases (*f*). This in turn has led to doubt and speculation as to the precise effect of these cases. For that reason, this article will attempt a restatement of the so-called rule in *Howe* v. *Lord Dartmouth*, together with its

(*a*) (1802) 7 Ves. 90.
(*b*) By S. J. Bailey, 7 The Conveyancer (N.S.) 129.
(*c*) (1749) 1 Ves.Sen. 308, at p. 310. And see *Maxwell* v. *Wettenhall* (1722) 2 P.Wms. 26.
(*d*) (1801) 6 Ves. 520, at p. 542.
(*e*) [1926] W.N. 93.
(*f*) *Re Trollope's Will Trusts* [1927] 1 Ch. 596; *Re Berton* [1939] Ch. 200.

so-called corollaries, and, equally important, to assign the appropriate authority to each proposition.

V

(1) If there is an express or statutory trust for sale, then the obligation to sell derives from the instrument or statute, and *Howe* v. *Lord Dartmouth* is irrelevant (*g*).

(2) If residuary personalty is left by will to persons in succession, and no intention appears from the will that the property is to be "enjoyed" in specie, then the executors must sell wasting, hazardous, unauthorised, and non-income producing assets, invest the proceeds in trustee securities, and pay the income to the tenant for life (*h*).

(3) Under a trust for sale, express or implied, the trustees may exercise a power or discretion to postpone, or it may be impossible to sell the property. In such cases there must be an apportionment.

The wasting, hazardous, and unauthorised assets must be valued, and the current percentage paid on that value to the tenant for life, pending conversion, the surplus income being invested to go with the capital (*i*). There seems to be no reason for distinguishing between express and implied obligations to sell with regard to the date of valuation, though this has been suggested (*k*). The valuation is normally to be made one year after the death (*l*). If, however, the trustees have an absolute discretion to postpone conversion, the notional value is that at the date of the death (*m*).

Apportionment will not be carried out if the testator expressly directed that pending sale the tenant for life was to have the actual income, or where that is the true construction of the gift (*n*).

In the case of non-income producing property, the apportionment must be carried out differently. Here, there is no income available

(*g*) See Keeton, *op. cit.*, pp. 260–1.

(*h*) *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137. This may properly be styled "the rule in *Howe* v. *Lord Dartmouth*," as this case collects the various propositions on the point. It is not settled whether this rule now covers leaseholds or not. Originally it did not: *Cranch* v. *Cranch* (1797) 7 Ves. 152. Later it seems to have been assumed that it did. There seems to be no reason why it should cover long leases, as these are not wasting. In any case, it is submitted that *Re Brooker*, *supra*, has no bearing on the matter.

(*i*) *Gibson* v. *Bott* (1802) 7 Ves. 90. In this case, decided by Lord Eldon three days before *Howe* v. *Lord Dartmouth*, the property in question, which was leasehold held on an express trust for sale, could not be sold owing to a defect in title.

(*k*) See Nathan, *op. cit.*, pp. 239–41.

(*l*) *Fearns* v. *Young* (1805) 9 Ves. 549.

(*m*) *Re Parry* [1947] Ch. 23. In this case Romer J. exhaustively examined the previous authorities on the matter. Doubt was expressed by counsel as to whether the rule of apportionment applied at all where trustees for sale had an absolute discretion to postpone. Precedent was binding here, but the House of Lords may decide the contrary.

(*n*) *Morley* v. *Mendham* (1856) 2 Jur. 998.

until the property falls in or is sold. When the property is realised, the trustees must ascertain what sum, invested at the appropriate date (*o*), at the current percentage per annum, accumulating at compound interest with yearly rests, would, after deducting income tax and adding the net accumulations, have produced, by the date of the sale, the sum actually received. The answer to this calculation represents capital, and the balance of the purchase money is paid to the tenant for life. The same principle applies if the trustees wait for the property to fall in (*p*).

(4) Where land is held upon trust for sale (*q*) the tenant for life is entitled to the net income (if any) pending conversion (*r*). At common law this applied only to realty (*s*). However, it was decided by Lawrence J. that, having regard to the definition of land contained in the Law of Property Act, 1925, s. 205 (1) (ix), this now applies also to leaseholds (*t*).

(*o*) The appropriate date is presumably governed by the same principles as the appropriate date for a valuation of wasting assets. However, it seems to be more usual to take the date of the death.

(*p*) *Re Earl of Chesterfield's Trusts* (1883) 24 Ch.D. 643. Here, the property was a mortgage, the interest being in arrear. However, it seems that the commonest type of non-income producing property is reversionary interests.

(*q*) A trust for sale of realty can only be express, statutory, or constructive, but it is unsettled whether leaseholds are subject to the rule in *Howe* v. *Lord Dartmouth*.

(*r*) Law of Property Act, 1925, s. 28 (2); this rule gives way to a contrary intention in the instrument.

(*s*) In *Gibson* v. *Bott*, *supra*, an apportionment was directed in respect of leasehold land held on trust for sale. In *Re Searle* [1900] 2 Ch. 829, an apportionment was refused in respect of realty.

(*t*) *Re Brooker* [1926] W.N. 93. This was a decision on an express trust for sale. It has been followed in a case of a statutory trust for sale: *Re Berton* [1939] Ch. 200. Assuming that a trust for sale of a leasehold could arise under *Howe* v. *Lord Dartmouth*, it is uncertain whether *Re Brooker* would apply to the income pending sale. The view that it would is adopted in Snell's Principles of Equity, 22nd ed., p. 164, and is supported by s. 28 (5) of the Law of Property Act, 1925, which provides: "This section applies to all dispositions on trust for sale. . . ." The contrary view is that a trust arising by implication under *Howe* v. *Lord Dartmouth* is not a disposition; see Nathan, *op. cit.*, p. 248. The whole problem is thoroughly discussed in an article by S. J. Bailey in 4 Cambridge Law Journal, 357.

THE LAND REGISTRATION ACT, 1925, AFTER TWENTY-FIVE YEARS—ANOTHER VIEW

By W. J. L. Ambrose, Barrister-at-Law

The Land Registry has had the good fortune to meet plenty of able and informed criticism of its work. As a former member of its staff, modesty compels me to ascribe its efficiency to this rather than to the excellence of its staff. And now Mr. Graham's article (*ante*, pp. 85 and 160) is a pretty stiff dose of the same tonic. It rather reminds me of an Horatian tag about *parturiunt montes*. I only hope his comparison or contrast of the simplicity and cheapness of the two rival methods of conveyancing will not reveal (if he will pardon the term) a *ridiculus mus*.

In the paragraph headed " Simplicity " on p. 87, Mr. Graham says: " If registration were entirely voluntary it no doubt would be the case that registered titles would be simpler because those titles which were suitable for registration would be registered and those which were not would not." The matter does not seem important but I should like to know what he means by titles suitable for registration. Does this connote short or long, defective or good titles, or what sort of title?

Mr. Graham has restated some of the arguments produced against extension of compulsory registration of title on sale to the county of Surrey at the recent inquiry and uses them in an attempt to condemn the whole registration system. One short and complete answer to his attack is that, after an elaborate inquiry, Mr. J. Neville Gray, D.S.O., Q.C., had no difficulty in finding that extension of compulsory registration to the county of Surrey was desirable. It is not necessary and would be wearisome to deal exhaustively with all the points made by your contributor, most of which were being talked about more than 30 years ago. But mention should be made of a few of the errors or omissions of which Mr. Graham is guilty, so that your readers can assess for themselves the value to be accorded to his conclusions.

First, as regards leases. Mr. Graham appears to think that a lessor would grant a lease to a company without seeing its memorandum and articles of association. He also appears to be under the impression that a purchaser of a lease from a company would make no inquiry as to the powers of the directors, would make no

searches in the Companies Register or in the Land Charges Register, but would blithely assume that as the land was not registered all these tiresome precautions could be ignored. In fact, the position is quite the reverse. It is in the case of a lease registered under the Land Registration Act that a purchaser has no need to search against the vendor company, either in the Companies Register or in the Land Charges Register; nor, unless there is an entry on the Land Register, is the purchaser concerned as to whether the company has charged the property by way of floating security or otherwise. Also, leases for 50 years are hardly ever in practice terminated by the lessee handing the keys to the lessor. The lessor insists on a deed of surrender and, of course, where the lease has changed hands as in the example quoted, the lessee would have to prove his title and the lessor would make the usual searches against him. Mr. Graham suggests that if the lease is registered it can never be expunged from the register unless it is surrendered or transferred to the lessor by deed. He forgets the provisions of section 46 of the Land Registration Act, 1925. As to disclaimer of leases under the War Damage Acts, if Mr. Graham ever has to advise on such cases he will find that the procedure is much more complex than he would appear to believe. In those cases where the leasehold interest affected is registered, the Registry is frequently able to trace the whereabouts of the lessee when the lessor has not been able to do so.

So much for leases. Mr. Graham next turns his attention to the case of a sale of freehold, and he embarks on an account of the inquiries and searches that have to be made and complains that these are the same whether the land is registered or not. That a search in the Land Charges Register is not necessary when the land is registered he forgets to mention. He also ignores the work involved in finding the whereabouts of the original documents, obtaining production of them, payment of costs of production and possibly of journeys for this purpose, comparing the abstract with the originals and verifying that they include the land in question, and drafting any special conditions of sale required by the state of the title, and all or most of the work may have to be done again on the occasion of the next mortgage or sale. Practically all this expense and trouble is eliminated if the land is registered with absolute or good leasehold title. Nor does he appear to be aware, when he compares the advantages of an instrument of transfer and a conveyance (and, of course, finds that a conveyance is just as convenient as a transfer), of the large number of first registrations in which the parties take advantage of the provisions

of rule 72 of the Land Registration Rules, 1925, and use a transfer instead of a conveyance.

On p. 90 Mr. Graham says: "There can be no doubt whatever, so long as there exist overriding interests, restrictive covenants and the like, requisitions will be necessary although they may well be shorter than in the case of unregistered conveyancing." His reference here to restrictive covenants must be an oversight. If a registered title shows none, requisitions about them would be quite unnecessary. If the registered title does show restrictive covenants all available evidence of their terms will be on the register or referred to therein.

Mr. Graham also suggests that extra documents will be necessary to deal with matters arising under the Town and Country Planning Act, 1947, but so far at all events he does not indicate their nature, or why a registered title should in this respect differ from an unregistered title.

Near the top of p. 92 there is a reference to double stamp duty, which is so worded as to suggest that this results from registration. Does Mr. Graham mean that?

Estate agents do not make a selling point of the fact that a title is registered because they rarely know whether it is registered or not. They do not concern themselves with conditions of sale drawn by the solicitor. Personally, I have once, and, I think, twice extracted a slightly better price because the purchaser's solicitors' costs would be reduced by registration.

Sir John Stewart Wallace used to advocate registration in the compulsory areas on the insurance principle. I cannot remember how he defined this, and I fear to do him an injustice by defining it myself. But I think he meant that rule 29 (which authorises registration of absolute or good leasehold title on the strength of a certificate by a solicitor) should be extended to apply to values considerably above £500 or £700 as the case might be, and, if claims for indemnity resulted, that they should be paid without any fuss. However, the necessary alteration of the rules was never made and he was not given the opportunity of putting this method to the test. It would have shocked the old-fashioned conveyancer but would have been an interesting experiment.

With all due deference to the Tomlin Committee, experience shows that the phrase "State Guaranteed Title" is a compendious and convenient phrase for distinguishing the absolute and good leasehold titles created by the Land Registration Acts and earlier Acts from the unregistered titles created by a succession of deeds, wills, etc. But if anyone attaches any value to the State guarantee he will want to know its terms, and a very little inquiry will tell

him that the terms of the guarantee are to be found in various Acts and Rules, and that to appreciate the measure of it a good deal of legal knowledge is necessary. The position is rather similar to that of a person with an insurance policy. The policy contains numerous conditions in small type which the insured rarely troubles to read and probably could not understand if he did read them. If he chooses to over-estimate the extent of the cover it gives him he has only himself to blame. In the case of land, houses, etc., the simplest persons know that they cannot deal with these without legal assistance. It has been said that the man who is his own lawyer has a fool for a client. Mr. Graham's jibe at the term " State Guaranteed Title " is really unworthy of him. What amendment of the relevant sections does Mr. Graham suggest are called for to justify this phrase? Is he aware that in the case of *Re 139 High Street, Deptford*, the registered proprietor was compensated in full for the value of the property which he had lost and his costs? What would have been the position of the proprietor if his title had not been registered? *Att.-Gen.* v. *Odell* was a very peculiar case and turned on section 7 of the Land Transfer Act, 1897. Odell, in all innocence, accepted a forged transfer of a registered charge and got himself registered as proprietor of it. The fraud was duly discovered later and the register was rectified by cancelling Odell's proprietorship and restoring that of the former proprietor. Odell then claimed indemnity under section 7 of the Land Transfer Act, 1897, against the Attorney-General as representing the insurance fund set up by that Act. Kekewich J. allowed the claim but the Court of Appeal reversed him, and to justify this course they virtually incorporated into section 7 the decision of the House of Lords in *Sheffield Corporation* v. *Barclay* ([1905] A.C. 392), which decided that the presentation of an instrument for registration imports a guarantee that it is genuine. It was an extraordinary decision which seems in direct conflict with section 7 of the 1897 Act, but this apparently settled the law till the 1925 Act altered it.

Identity

In the second part of Mr. Graham's article he displays a wealth of industry, but does not demolish the case for registration as effectively as he would appear to wish. It suggests an advocate speaking from his brief rather than a judge delivering a considered judgment. He finds various faults either with the law as it stands or with the Land Registry's practice. In the absence of numbered

paragraphs it is difficult for me to refer to his points without a good deal of repetition of his observations.

In his second paragraph he says that verbal descriptions of the land are discouraged. This is not correct. If the land is a house or building with a name or street number the name or number is almost invariably inserted in the register. If the land can be satisfactorily defined by the plan, a list of the owners or occupiers of adjoining land, as found in many deeds, is useless. The practice is substantially the same as in good unregistered conveyancing except that the Registry uses more plans.

If a boundary of the land to be registered is undefined it must usually be defined on the ground so that it can be surveyed. It has got to fit into its proper place on the ordnance map, otherwise a bit of land might get into two titles.

On p. 161 Mr. Graham says with regard to boundaries of registered land "it may well be that the present practice of the Registry is admirable where the property sold comprises a nice neat suburban villa standing upon a nice neat square of ground—indeed, one sometimes gathers the idea that the whole system of registration is designed with that sort of property in mind, and that it would work admirably if it were not called upon to deal with any other."

It seems odd that Mr. Graham has not ascertained that there are enormous areas of agricultural and undeveloped land already registered and that the Registry has had years of experience with such land. The Land Registry Act, 1862, and the Small Holdings and Allotments Acts of later years brought large areas of such land upon the Register, and people whose business was developing land found registration of their titles was well worth while, although they generally had to pay the cost of surveys in addition to the usual registration fees.

Mr. Graham complains that:—

1. The register does not show the state of cultivation.
2. The register does not show the exact area of each field.
3. "T" marks are not inserted in the title plan.

As regards 1, a common law conveyance speaks from its date and can describe the state of cultivation at that date. A title plan must have a longer life and may have to be accurate for many years. Does Mr. Graham seriously suggest that the ordinary practice of rotation of crops should be reflected in the title plan or in the wording of the property register?

As to 2, for conveyancing purposes the exact area of each field which does not abut on a boundary is, with all respect, quite unimportant. To ascertain it might involve a special survey. The 25in. ordnance survey states areas of parcels, but where there is a hedge and ditch the line of the root of the hedge is the boundary of the parcel. All land is in one or other ordnance survey parcel, but a parcel in this sense means any conveniently sized space and may by means of braces include small gardens or yards or streams. It is not the fault of the Registry or of the Land Registration Acts and Rules that *Fisher* v. *Winch* [1939] 1 K.B. 666 was decided as it was decided. The boot is rather on the other leg. It shows how necessary it is to leave the precise position of a title boundary undefined until it has manifestly been agreed or fixed by due process of law.

As to 3, "T" marks are usually employed to indicate which fences a grantee must erect or repair, and not which fences a grantee will get. In the absence of an express grant of the fence or the site of it, the covenant to erect or repair may or may not import some title to the fence. But unless such covenant or grant in a later deed is in harmony with the covenant or grant in an earlier, it is obviously inoperative at all events as a grant. The Chief Land Registrar usually sees only one of such deeds and does not know whether it is the earlier or the later; and in the absence of a clear title to the fence it is obviously undesirable to register the title thereto without taking the precautions indicated by rule 276. If "T" marks were inserted in title plans without anything in the register to explain their meaning, Lincoln's Inn, and I expect Mr. Graham, would be down on the Chief Land Registrar like a hundred of bricks.

Easements and Profits

Mr. Graham quotes the following passage from a pamphlet issued by the Land Registry more than a quarter of a century ago: "It is only necessary to read the land certificate." The pamphlet had at least 39 paragraphs and if the few words he quotes are a fair representation of the pamphlet as a whole, the statement is obviously inaccurate. It suggests (*inter alia*) a purchaser could buy from a mortgagee without seeing the mortgage or charge certificate. The Registry staff may be stupid, but I cannot believe it would make such a blunder. It is wonderful how condensed extracts can distort meanings.

Mr. Graham says "a right of way is usually defined by reference to a fairly large scale plan and the extent is invariably to be found

in the deeds." Of course, if a right of way is created by a deed its nature and extent can only be found in that deed. But Mr. Graham is in error if he thinks such deeds invariably define it adequately. The land over which the right of way was granted is frequently a matter of doubt and leaves the extent of the right very uncertain. This is particularly the case when the purchase is small. One would like to have the observations of the Land Registry on the particular case cited by Mr. Graham when the Registry omitted to include in a title: " (1) a right of way for all purposes in connection with the use of the premises hereby transferred as a private residence over and along the road . . . (2) a right of free passage and running of water and soil through the sewers, etc., in through and under the adjoining lands of the said . . . and used in common with the land hereby transferred." There are possible reasons why the Registry may have omitted to include these rights in the title, but I have the greatest difficulty in believing that the right of way was omitted because it was " obvious " or that the purchaser's solicitor did not carry the matter further. The following questions arise:—

(a) Had the road over which the right of way was granted been dedicated to the public as a highway?
(b) Was all such road in the vendor's title or titles? and
(c) If so, had all proprietors of charges on such titles joined in the transfer and lodged the relevant certificates?

As regards the sewers, if they were truly sewers they were vested in the sanitary authority and a grant of the right to use them was unnecessary and could not be granted by the registered proprietor. If they were not truly sewers but what Mr. Graham calls " &c." title to grant the rights must be proved or notices to the occupiers of the land affected would be called for pursuant to rule 252 *et seq.*

Rule 78 confers on the Chief Land Registrar a certain discretion as regards the forms of the instruments he need register. Mr. Graham is not accurate when he says: " It is for a court of construction, not the Registrar, to say if it [*i.e.*, the instrument] means anything and if so what."

Under the heading " Independent Registration," Mr. Graham makes some interesting observations on (a) registration of title to certain incorporeal hereditaments and (b) on entering notice of adverse easements. He suggests that if this is done properly the land certificate becomes *exactly* equivalent to an abstract and the claim of simplicity is gone.

As regards the former the nature of the property may call for a lengthy description in the property register, but if it is registered with an absolute or good leasehold title all later documents which

would be requisite to prove ownership if the title were not registered, are condensed into two or three words and a purchaser would not be concerned with them. Has Mr. Graham really overlooked this?

Rule 50 deals (*inter alia*) with registration of incorporeal hereditaments. Rule 52 deals with registration of a rent or tithes or rentcharge in lieu of tithe, and requires the land affected thereby to be identified. Rule 257 deals with the benefit of an easement right or privilege appurtenant to land. The scope of these three rules seems reasonably clear. The right of fishing in a fresh water river is usually an incident of the ownership of the bed of the river or part of it. If it is an independent incorporeal hereditament it comes within rule 50 and rules 52 and 257 have nothing to do with it.

As regards adverse easements, the entry of which he complains may have been unnecessary since it says no more than section 70; but it does warn a purchaser that there are rights of drainage through the " sewers, etc." and if he wants more information about them he must make his own inquiries. If the title deduced disclosed an easement right or privilege, section 70 (2) directs the entry of a note thereof; and although rule 41 gives the Chief Land Registrar a certain discretion, the Register would certainly show a right of drainage in favour of a specified property, unless there was some good reason for not doing so, such as the construction of a public sewerage system.

On the subject of restrictive covenants, Mr. Graham says if they, *i.e.*, the restrictive covenants, are recorded by reference then a purchaser " of registered land can only put himself into the same position as a purchaser of unregistered land by obtaining an official copy of the deed imposing the covenants. If the land had not been registered the deed would have been abstracted and in his possession in any event."

Mr. Graham ignores the fact that the deed imposing the covenants may and probably does affect a lot of other land, that it may be difficult and costly to trace it and that no " official " copy is at the Registry or to be found. It is quite inaccurate to say that if the land had not been registered the deed would have been abstracted and in his possession in any event. Mr. Graham's over-statements are becoming monotonous. They make the phrase " state-guaranteed title " a model of precision by comparison. As a matter of fact the shortage of paper and of skilled typists made it necessary to curtail entries of both restrictive covenants and of positive covenants which might call for a covenant for indemnity from a subsequent purchaser. But this has now been remedied: see the Chief Land Registrar's Report for 1951–52, para. 4.

Mr. Graham's point under section 86 of the Agriculture Act, 1947, is, as he says, a small one. There are plenty of other and better ways of ascertaining the relevant facts than by perusing an abstract.

Under the heading "Covenants for Title," Mr. Graham refers to the State guarantee as a broken reed, and cites *Re Chowood*. Does he suggest that the State guarantee should make an absolute or good leasehold title exempt from the consequences of adverse possession, and that, if it does not do that, the State guarantee is a fraud or misnomer? If the State guarantee did that, it would no doubt make registration of title very popular, especially when the unregistered title has become extinguished, but it would create a startling discrepancy between registered and unregistered titles.

Town and Country Planning Matters

These may be very important but in practice a purchaser has got to consider the local planning scheme itself and it would be difficult to summarise it on the register of title. They are therefore properly made overriding interests. Statutory declarations of user on the material dates seems preferable to recitals. But why Mr. Graham thinks that the claim for loss of development value should be for ever tied to the land is not apparent.

Leases

Mr. Graham has devoted a good deal of time to the question of registering leases and noting them on the title to the reversion. I am not sure that I have properly understood his argument, and what look like errors in the references to parts of the Act make it no clearer.

As registration is designed to facilitate dealings with land, it is not much use to register title to a lease which cannot be assigned. If and when the lessor has granted a sufficiently liberal licence to assign, the lease will have been modified and no longer contain an absolute prohibition against all dealings *inter vivos*, and the title thereto could presumably be registered.

As regards leases for 21 to 40 years, the case of Blackacre put by Mr. Graham (p. 174) does not seem to have any particular bearing on registration. The position of the purchaser of the freehold will be the same as that of any other purchaser of unregistered land. P will inquire what business T the lessee has on the land, and, unless the contract falls through on account of this lease, the conveyance to P will be expressed to be subject to T's lease, and in due course it will be noted on the register of P's title.

The case of the reversionary lease posed on p. 175 is presumably a case of fraud. The criminal law is designed to deter people from such tricks. As it did not deter V from selling without disclosing the reversionary lease to the purchaser, a case for rectification or indemnity would arise, and one or other of the innocent parties would get compensation.

His suggested amendments of the sections of the Acts dealing with leases would enlarge the area of registration, and this would presumably offend the opponents of registration.

The present code has worked fairly well for a good many years, and solicitors have got used to it. I doubt if either branch of the profession would welcome these changes.

Estate Contracts and Third Party Interests

Mr. Graham thinks that registration under the Land Charges Act, 1925, is a better device for protecting estate contracts, etc., than registration against a registered title of notices under sections 49 to 52 of the Act. The only reason he gives is that the land certificate must be produced to the Registry. Many and probably most titles bear a registered charge and in such cases the land certificate is already in the Registry. In other cases a purchaser could stipulate in the contract that the land certificate should be produced in order that the necessary notice could be entered.

A search for land charges is often an appalling affair. It may reveal dozens of entries most of which do not affect the land in question; others are not really restrictive covenants at all or are covenants to observe restrictive covenants in some earlier deed, and are intended to be by way of indemnity only. Land is often registered for the purpose of clearing up the mess made by the land charges register. I suggest Mr. Graham consults some of his solicitor clients on their opinion of this register.

A caution under section 54 usually indicates the existence of a genuine dispute and is intended to maintain the *status quo* till the dispute has been resolved. If a man lodges a caution without reasonable cause it seems eminently fair that he should pay compensation for damage thereby caused. In hostile litigation costs usually follow the event.

White *v.* Bijou Mansions, Ltd.

There is no doubt some substance in Mr. Graham's point about *White* v. *Bijou Mansions, Ltd.* [1937] Ch. 610; [1938] Ch. 351. It is not very serious, as there are ways round it, as indicated by Mr. Graham. The cost of inspecting the lessor's registered title

would be small, but if the lessor will not consent to that course, the proposed lessee may have to consider whether it is worth his while to take the risk of going on with the matter further. If the prospective lessee contemplates a particular user which is important, an express covenant of title by his lessor might be required.

As regards death duties, the procedure laid down in section 73 of the Act and rules 191 to 193 simplifies matters for a purchaser, and robs death duties of a good deal of their sting, so far as the purchaser's solicitor is concerned. It goes a good way to justify the reduced costs he can charge in a dealing with registered land.

Charges

As regards charges on registered land, these appear to find favour with Mr. Graham. He not only gives a very considerable exposition of the differences between registered and other charges, but also gives the former a pat on the back, and resists the temptation to comment on the statutory misprint of " indentify " for " identify " in section 25 (2) (a).

On the somewhat obscure effect of section 25 (3) (ii), which is said to relate to consolidation, Mr. Graham is not very helpful. As the right to consolidate is merely a right to resist redemption of one only of two or more charges, one wonders what provision in the charge is made void by subsection (3). There is a note on p. 122 of the 4th edition of *Brickdale and Stewart Wallace's Land Registration Act, 1925*, which no doubt correctly explains the object of this subsection, but it is not clear how it effects that object, and one has to turn to rule 154 to ascertain this. Mr. Graham does not say whether the entry of notes of consolidation under rule 154 confers a right of consolidation which would not otherwise exist.

Conclusion

Mr. Graham ends up with a recapitulation of his criticisms and suggestions and says that the registered system would never be very much simpler than the unregistered system. He again ignores the fact that all documents which are abstracted merely for the purpose of showing ownership from the date of the root of title would come off the title, and all journeys, expenses and trouble for the purpose of inspecting such documents would be saved.

Finally, he suggests that a Royal Commission or departmental committee should consider which system is the more advantageous to the country as a whole, bearing in mind that any registered system involves a registration staff.

There is an element of humour in Mr. Graham's last suggestion. There have been numerous grand inquests on land registration; and each has given a verdict in its favour in the form of Acts of 1875 and 1897 and the provision in the Law of Property Act, 1922, relating to land registration. These are now incorporated in the Land Registration Acts of 1925 and 1936.

The fathers of the present code were a committee set up by the Lord Chancellor, of which Lord Justice Romer was chairman, and included men of the calibre of Sir Benjamin Cherry and Sir Arthur Underhill. They and all other conveyancers must have realised that registration of title must be a severe blow to Lincoln's Inn—but no one would suggest they did not do their best to give it a fair trial. No doubt under the old law there were good reasons why the purchase or sale of a £1,000 house should cost so much more in expenses than the purchase or sale of a comparable amount of stock, but the layman could not understand this, and something had to be done about it.

As regards the cost of registration, to which Mr. Graham quite properly refers, the Land Registry's expenditure for the last financial year was £504,000. This included the cost of keeping the register of land charges—a very big item—and the agricultural credits department. The average cost of the 399,000 first registrations and dealings with registered land was 18s. 7d. each. On these figures the cost of the registration staff is comparatively trifling.

These hard facts suggest that the Royal Commission or departmental committee suggested by Mr. Graham could readily recommend the extension of compulsory registration. But Mr. Graham need not fear that universal registration can be brought in by the stroke of a pen. The extension would have to be gradual, first because the ordnance maps of any new areas might have to be revised, and brought up to date, and secondly because the Registry might have to enlist and train new staff. If registration is to pay its way on the scale of fees which are at present authorised, highly skilled staff are essential.

AGRICULTURAL HOLDINGS: LANDLORD'S REMEDY FOR DILAPIDATIONS

By J. Muir Watt, m.a., Barrister-at-Law

Certain *obiter dicta* on the part of Singleton L.J. in *Gulliver* v. *Catt* [1952] 2 K.B. 308, and the actual decision of Slade J. in *Kent* v. *Conniff* [1952] 2 T.L.R. 209, must have come as something of a surprise to a number of practitioners concerned with the law affecting agricultural holdings. The effect of Slade J.'s decision is that an agricultural landlord may, during the subsistence of a contract of tenancy of an agricultural holding, bring an action for damages in the courts, based on the terms of the contract, in respect of dilapidations to the holding, and that this applies not only to dilapidations affecting buildings but also to dilapidations affecting the farm land itself. This decision is contrary to the view which has been taken by many of those who have been closely concerned with the Agricultural Holdings Act, 1948, since it was passed. They have been under the impression that the joint effect of section 57 (3) (a) and section 70 (1) (b) of the Act is to postpone the landlord's contractual claim until the tenant quits the holding on the termination of the tenancy, and, moreover, to restrict his remedy to arbitration under the Act and to exclude resort to the courts. The view adumbrated by Singleton L.J. and accepted by Slade J. must, for the time being at any rate, be regarded as the law of England. Those who have held the other view may, however, wish to re-examine their grounds for holding it, and at the same time make up their minds whether the decision of Slade J. is convincing, or whether it may perhaps be open to review if the same point is litigated again in the Court of Appeal or House of Lords.

The actual terms of section 57 of the Agricultural Holdings Act, 1948, are as follows:—

> "57.—(1) The landlord of an agricultural holding shall be entitled to recover from a tenant of the holding, on the tenant's quitting the holding on the termination of the tenancy, compensation in respect of the dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry.

" (2) The amount of the compensation payable under the foregoing subsection shall be the cost, as at the date of the tenant's quitting the holding, of making good the dilapidation, deterioration or damage.

" (3) Notwithstanding anything in this Act, the landlord may, in lieu of claiming compensation under subsection (1) of this section, claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy, so however that—

(a) compensation shall be so claimed only on the tenant's quitting the holding on the termination of the tenancy; and

(b) compensation shall not be claimed in respect of any one holding both under such a contract and under the said subsection(1);

and for the purposes of paragraph (b) of this subsection any claim under subsection (1) of section seven of this Act shall be disregarded."

The two other statutory provisions which are directly relevant to the argument are section 65 (1) and section 70 (1) of the Act. As these are short, and as their actual terms are important, it is worth while setting them out here. The proviso to section 65 (1) is omitted.

" 65.—(1) Save as expressly provided in this Act, in any case for which apart from this section the provisions of this Act provide for compensation, a tenant or landlord shall be entitled to compensation in accordance with those provisions and not otherwise, and shall be so entitled notwithstanding any agreement to the contrary:"

" 70.—(1) Without prejudice to any other provision of this Act, any claim of whatever nature by the tenant or landlord of an agricultural holding against his landlord or tenant, being a claim which arises—

(a) under this Act or any custom or agreement; and

(b) on or out of the termination of the tenancy of the holding or part thereof,

shall, subject to the provisions of this section, be determined by arbitration under this Act."

The view which has now been rejected by Slade J. was based on the following reasoning: Section 65 provides that where compensation is provided for in the Act compensation must be claimed in accordance with the Act and not otherwise. Section 57 provides for compensation for the landlord in respect of dilapidations to the holding due to a breach by the tenant of the rules of good

husbandry. Section 57 (1) gives the landlord a *statutory* right to claim for dilapidations. Section 57 (3) preserves to him a *contractual* right to claim (which would otherwise have been affected by section 65 (1)) but preserves it subject to the limitation that it must be brought only on the tenant's quitting the holding on the termination of the tenancy. It must, of course, be understood that the contractual claim dealt with in this way is one which falls within the subject-matter mentioned in section 57 (1), *i.e.*, it must relate to "the dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry." As compensation under section 57 (3) can only be claimed on the tenant's quitting the holding on the termination of the tenancy, the claim seems to be one which arises on the termination of the tenancy within the meaning of section 70 (1). If so, it is not merely postponed until the termination of the tenancy, but it must be dealt with by arbitration under the Act, not by an action in the courts. Is there any flaw in this reasoning? Let us see how it fared in *Gulliver* v. *Catt* and *Kent* v. *Conniff*.

It is necessary at the outset to make it quite clear that the point did not really arise in *Gulliver* v. *Catt* at all. In that case, the landlord served a notice to quit on the tenant before March 1, 1948. It is beyond doubt that, as a result of section 99 of the Agricultural Holdings Act, 1948, the provisions of that Act relating to compensation and the recovery of compensation did not in these circumstances apply, and that the rights and remedies of the parties depended on the 1923 Act. This was recognised by Barry J. in the court below in a judgment of model brevity and clarity, which resisted any temptation to stray into the realms of *obiter dicta* (*a*).

When *Gulliver* v. *Catt* went to the Court of Appeal, however, the scope and effect of section 57 (3) of the 1948 Act was discussed to some extent, particularly in the judgment of Singleton L.J. He was obviously inclined to accept the argument for the landlord that section 57 (3) gave the landlord an option to proceed under it, but did not compel him to do so or deprive him of his ordinary contractual right to bring an action during the tenancy to enforce the covenants to repair roads and buildings and to clean and scour ditches and watercourses. Thus, Singleton L.J. said at one point: "That claim is one made by the landlord for breaches of undertakings in the tenancy agreement, and it might well be that if such a claim were put forward, when the tenants quitted the holding, the

(*a*) [1952] 1 All E.R. 97.

landlord could, if he liked, have treated it in the way envisaged as possible by section 57 (3), but the landlord has said: 'I do not want so to do'" (*b*). The landlord's counsel in *Gulliver* v. *Catt* seems to have based his argument that section 57 (3) did not compel a landlord who wished to claim under the covenants of the tenancy from proceeding under section 57 (3) on the optional wording of section 57 (3), which begins "notwithstanding anything in this Act, the landlord *may* . . . ". As Slade J. pointed out in *Kent* v. *Conniff* (*c*), the "may" in subsection (3) does not really support this argument. The "may" in this subsection merely indicates the option given to the landlord between the statutory claim and the contractual claim. It does not at all indicate that the landlord has an option between pursuing his contractual claim subject to the limitations of section 57 (3) (and, possibly, section 70 (1)), and pursuing it without such limitations. Slade J., as will be seen later, rested his decision on a broader ground.

Before leaving *Gulliver* v. *Catt* it is worth noticing another dictum by Singleton L.J. about the nexus between section 57 (3) and section 70 (1). The sentences in which this dictum occurs are indeed slightly obscure. He said: "The tenants' contention is that under section 57 (3) this claim arose on the termination of the tenancy, and, therefore, it came within section 70 (1) (b). For myself I am not satisfied that it did. Section 70 (1) (b) deals with a claim arising 'on or out of the termination of the tenancy of the holding or part thereof'; and section 57 throughout is dealing with a position which arises on the tenant quitting the holding on the termination of the tenancy—a different proposition" (*d*). Perhaps Singleton L.J. means that it is one thing to say that compensation shall be claimed only on the tenant's quitting the holding on the termination of the tenancy, and that it is quite a different thing to say that the claim *arises on* the termination of the tenancy. In other words, perhaps he is drawing a distinction between a claim which arises during a tenancy, but compensation for which can only be obtained on the termination of the tenancy, and a claim which only comes into existence on the termination of the tenancy. In the one case the right exists during the tenancy but the remedy is postponed; in the other, the right springs into existence only at the end of the tenancy. This distinction is, however, somewhat thin. Although intelligible in theory it is rather unreal in practice, since the right is not of much interest so long as the remedy does not

(*b*) [1952] 2 K.B. 308, at 312–313.
(*c*) [1952] 2 T.L.R. 209, at 215.
(*d*) [1952] 2 K.B. 308, at 313.

exist. Further, can we really believe that Parliament in enacting section 57 (3) and section 70 (1) intended to draw such fine distinctions? The word "claimed" appears in section 57 (3) and the word "claim" in section 70 (1). Is it not legitimate to regard them both as describing the same thing? If compensation can be claimed only on the termination of the tenancy (section 57 (3)), surely this is compensation a claim for which arises on the termination of the tenancy (section 70 (1))? If so, the nexus between these two subsections is complete.

So much for the somewhat inconclusive dicta in *Gulliver* v. *Catt*. An analysis of *Kent* v. *Conniff*, where the point actually arose for decision, is more rewarding. In this case the landlord had made a claim, inter alia, for damages for dilapidations, based on alleged breaches of a covenant to repair erections, buildings, boundary walls and fences. The tenants, who were still in possession at the date of the trial, took the preliminary point of law that an action for damages for dilapidations to an agricultural holding could not, on the true construction of section 57 (3), be brought during the tenancy but only after the tenancy had terminated and the tenant had actually quitted the holding. The action was, therefore, premature. It is to be observed that the tenants did not take the point that the proper remedy was arbitration. It was not the nature of the forum but the postponement of the right to claim which was the bone of contention. The question discussed above about the nexus between section 57 (3) and section 70 (1) was not, apparently, argued. As Slade J. said: "I am not here concerned with access to the Queen's courts, which is no part of Mr. Collard's argument at all, but with a landlord's ordinary rights to sue for damages for breach of contract the moment the breach of contract has been committed" (*e*).

Before coming to the more controversial part of Slade J.'s judgment it is as well to deal with one point upon which he clearly states the correct principle but, it is submitted with respect, without applying it correctly. It is clear that any contractual claims which do not fall within the categories specified in section 57 (1) will not be affected by section 57 (3). Section 57 (1), as already mentioned, applies only to claims "in respect of the dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry." The contractual claim mentioned in section 57 (3) must be "in respect of matters specified" in section 57 (1)—*i.e.*, the subject-matter of the contractual claim in section 57 (3) is co-extensive

(*e*) [1952] 2 T.L.R. 209, at 215.

with that of the statutory claim covered by section 57 (1). There is, therefore, nothing to prevent a landlord from bringing an action during the tenancy, under the covenants of the tenancy, in respect of some breach which is not covered by the subject-matter specified in section 57 (1). Slade J., however, thought that " mere claims for dilapidations to buildings, which have no bearing at all upon the way in which the farm is worked " (*f*) were outside the scope of section 57 (1) and, accordingly, outside the scope of section 57 (3). This, however, appears to be erroneous. The expression " fixed equipment " is defined in section 94 (1) to include buildings, and section 94 (2) applies for the purposes of the 1948 Act sections 10 and 11 of the Agriculture Act, 1947, which deal with the rules of good estate management and the rules of good husbandry. If section 10 (3) and section 11 (3) of the 1947 Act are carefully studied, it becomes clear that an occupier may be guilty of a breach of the rules of good husbandry if he fails to carry out repairs to fixed equipment, the liability for which he has assumed in the tenancy agreement. Further, the repairing obligations in relation to fixed equipment contained in the Schedule to the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (*g*), are deemed to be incorporated in every contract of tenancy of a holding except in so far as they would impose on one of the parties to an agreement in writing a liability which under the agreement is imposed on the other: see section 6 of the 1948 Act. Failure to repair the buildings on a holding may, therefore, be a ground for a claim under section 57 (1), and may, consequently, be within the scope of section 57 (3).

Slade J. was, however, prepared to hold that even in the case of a claim which clearly falls within the ambit of section 57 (3), there is nothing to compel the landlord to avail himself of the procedure under section 57 (3), and nothing, accordingly, to prevent him from bringing an action for damages in the courts during the tenancy. The real ground of his decision on this important point is the principle which he quotes from the judgment of Scrutton L.J. in *Re Arden and Rutter* (*h*):—

> " I think it is a general principle of construction that you do not take away a man's right to compensation without clear words, and that if you have a doubtful case where one construction results in your taking away a man's right without clear words, and the other construction results in preserving it, you preserve the construction which covers the existing rights."

(*f*) *Ibid.*, p. 216.
(*g*) S.I. 1948, No. 184.
(*h*) [1923] 2 K.B. 865, at 878.

Can this principle really justify the decision at which Slade J. arrived in *Kent* v. *Conniff*? Agricultural holdings legislation is a code with its own special features. The 1948 Act has to be studied, not only as a whole, but also with some regard to previous Agricultural Holdings Acts and the difficulties to which they gave rise. In this context it need occasion no surprise to find that rights to claim compensation are restricted in certain ways in order to fit in with the general scheme of the legislation. Students of the legal history of agricultural holdings are well aware of the defects of section 16 of the Agricultural Holdings Act, 1923, as exemplified in the cases of *Lowther* v. *Clifford* (*i*), *Olive* v. *Paynter* (*k*), and *Preston* v. *Norfolk County Council* (*l*). Considered against this background there would be nothing very startling in finding that contractual claims for compensation for dilapidations, in so far as they covered the same ground as statutory claims, could only be enforced at the end of the tenancy, and could be enforced only by arbitration. The force of the general principle which Slade J. quotes from Scrutton L.J. is somewhat weakened in its application to agricultural holdings compensation. Further, Slade J. does not seem to dispose satisfactorily of section 65 (1), which lays it down that where the Act makes provision for compensation a landlord or tenant is to be entitled to compensation in accordance with those provisions *and not otherwise*, save as expressly provided in the Act itself. Read in the light of this subsection, all that section 57 (3) does is to give a restricted right to the landlord to bring a contractual claim for compensation instead of confining him to the statutory right provided by section 57 (1). The "may" of section 57 (3) is a "may" as between section 57 (1) and section 57 (3) only.

It is to be noted that Slade J. refused to base his decision on a distinction between "compensation" and "damages." This would have been a short cut to the decision at which he arrived, since section 57 does not mention "damages" and thus, if the distinction is valid, would not affect an action for damages brought during the tenancy. In dismissing the suggestion that he should reach his decision on this ground, Slade J. referred to the fact that "compensation" is the word used in section 146 of the Law of Property Act, 1925, although it is dealing with breaches of covenant, and to the observations of Fry L.J. in *Skinners' Company* v. *Knight* (*m*), which make little of the distinction between "compensation" and "damages."

(*i*) [1927] 1 K.B. 130.
(*k*) [1932] 2 K.B. 666.
(*l*) [1947] K.B. 775.
(*m*) [1891] 2 Q.B. 542, at 544.

One further argument in favour of the view taken by Slade J. deserves to be noticed. He called attention to the fact that s. 57 (3) allows compensation to be claimed only "under and in accordance with a *written* contract of tenancy." He pointed out that in a number of cases tenants of agricultural holdings are in possession under oral contracts, and he suggested that "if the only remedy is under section 57 (3) the landlord under an oral contract of tenancy containing such terms would be deprived altogether of redress." Apart, however, from the availability of the statutory claim under section 57 (1), the Act provides machinery in section 5 for the reduction of oral agreements to writing. It is the policy of the Act to encourage this to be done. There is, therefore, nothing unfair or surprising in the withholding of certain privileges so long as tenancies remain oral.

Finally, one asks whether the solution which commended itself to Slade J. gives a reasonable interpretation to section 57 (3). If section 57 (3) is not restrictive as regards the contractual claims but merely confers an option to pursue the contractual claim in accordance with the subsection while leaving unimpaired the ability to pursue it in the ordinary way, it surely confers an option of a most curious kind. It gives the landlord power to do in a restricted manner something which, on this view, he can do in an unrestricted manner, namely, make a claim under the covenants of the tenancy. An option is usually considered as a privilege which enlarges one's power over things, but this peculiar option seems to add nothing.

In matters of such difficulty it would be foolish to be dogmatic, but the above discussion may convince some readers that the decision in *Kent* v. *Conniff* is not without its perplexities, and that on a suitable occasion it may be open to review.

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Registered land—overriding interest—agreement under hand for lease of over three years—Land Registration Act, 1925, *s.* 70 (1) (*k*). —*City Permanent Building Society* v. *Miller* [1952] 2 T.L.R. 547, is fourth in the series of cases of a similar character beginning with *Coventry Permanent Economic Building Society* v. *Jones* [1951] 1 T.L.R. 739 (see notes, Vol. 15, p. 184 and p. 437), though as the Court of Appeal decided, the present case is only on a point collateral to the conflicting decisions in the cases that have preceded it.

An unfortunate widow with seven children was in desperate need of accommodation, and notwithstanding a warning from her solicitor, she was induced by a trickster, M., to part with all her ready money as a purported payment of rent in advance for three years for unfurnished premises, in which at the time M. had no interest whatsoever. The agreement with M. was under hand only and purported to give the widow an unfurnished tenancy for three years, and thereafter on a weekly basis at a rent of 30s. a week. Three months later a transfer of the property (it was registered land) was executed in M.'s name, and on the same day M. executed a charge over the property in favour of the plaintiffs, without of course mentioning the widow's interest. The following week, the transfer and charge were registered and the widow, having already been given the key, then went into possession. Ten months later, the plaintiffs sought possession of the premises, M. became " a guest of Her Majesty," and the question arose as to which of the two innocent parties should suffer as a result of M.'s fraud.

Harman J., at first instance, decided that the widow's interest could not be an overriding interest under section 70 (1) (k) of the Land Registration Act, 1925, because as there was a lump sum paid in advance, it was not a lease " without taking a fine " and Hodson L.J. agreed with this in the Court of Appeal. Evershed M.R. and Jenkins L.J., however, purposely did not give any opinion on this point, though they saw the danger of deciding that such a payment is not a premium in view of the Landlord and Tenant (Rent Control) Act, 1949. They based their decision on other grounds, with which Hodson L.J. also agreed. Section 70 (1) (k) reads as follows: " Leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine."

Evershed M.R. said that the real question was whether the word " lease " in section 70 (1) (k) covered this case, and he came to the opinion that it did not. As the agreement was for three years plus

one week at least, it was not capable of conferring an interest in the property unless it was by deed. The widow, the learned Master of the Rolls decided, had merely a right to specific performance of an agreement for a lease. She had no legal estate in the property, particularly as she was not in occupation until after the title was registered. The use of the word "granted" in section 70 (1) (k) inevitably restricted the meaning of the word "lease" to cases where an effective term had been created, and applying section 3 of the Act, the context did not require any other meaning.

If there were any doubts about this, the learned Master of the Rolls and Jenkins L.J. thought they were inevitably dispelled by a comparison of the provisions of the Land Registration Act, 1925, with the Land Charges Act, 1925. The widow's interest, if over unregistered land, would have had to have been registered as an estate contract under the latter Act. Evershed M.R. said: "It would be a surprising thing if in the case of registered land, the registered proprietor found he was bound to take the legal estate subject to a legal right of this kind. . . . It would have the result that the proprietor of registered land would be in a worse position than the transferee of unregistered land." He then referred to section 59 of the Land Registration Act, 1925, and said: "That makes it quite clear that if there is a contract which should be registered as a land charge in the case of unregistered land, then there is a corresponding provision" for registered land "which entitles the person claiming under it to register a caution or notice."

The court therefore found for the plaintiffs. It will be noticed that this case can be distinguished from *Woolwich Equitable Building Society* v. *Marshall* [1951] 2 T.L.R. 783 (see note, Vol. 15, p. 437), the other case in this series dealing with registered land, on the ground that the tenant was there in possession and therefore it was section 70 (1) (g) which was under consideration (the right of a person in actual occupation). In the present case, as the court held that there was no valid overriding interest, the second question, that is, whether a tenancy could be inserted by estoppel, did not arise.

It is important to note finally one observation of Evershed M.R. He said that if an interest is not capable of protection by notice or caution under the Land Registration Act, it continues to be covered by the Land Charges Act. "In other words, it is quite plain that the Land Charges Act is not wholly excluded *quoad* registered land." Does this mean that it is necessary to search in the Land Charges Registry on the purchase of registered land? If so, what for? This dictum is quite contrary to the commonly accepted meaning of section 59 of the Land Registration Act.

Undue influence—purchase of house—fiduciary relationship—full disclosure.—Tufton v. *Sperni* [1952] 2 T.L.R. 516, was a remarkable case, the facts of which the learned Master of the Rolls was glad to believe will never recur again. The plaintiff had bought a house from the defendant for twice its real value and sought to have the sale set aside on the ground of undue influence. The judge of first instance

found that undue influence in the sense of complete domination by one person over another had not been proved, and found for the defendant. The plaintiff appealed.

The plaintiff was a convert to Islam, and in regard to business matters he was credulous and unbusinesslike. He met the defendant, who was a structural engineer and also a Moslem, owing to their common religious interests. The defendant then joined the plaintiff on a committee to promote Moslem interests, and particularly to form a Moslem cultural centre in certain premises owned by the plaintiff. The defendant, as professional adviser, soon came to the conclusion that the plaintiff's premises were unsuitable for this purpose, and offered to sell his property (the subject-matter of the action) to the plaintiff to be used instead.

The plaintiff made his appeal on another ground than that at first instance, namely, on the broad equitable right to relief where it is shown that the defendant stood in such a relationship to the plaintiff that he owed him a duty of care and was bound to make him full disclosure of all material facts. The Court of Appeal (Evershed M.R., Jenkins and Morris L.JJ.), having considered the authorities at length and all the facts, found for the plaintiff.

Evershed M.R. said: "'undue influence' of the party charged, includes, as a matter of law, both undue influence in the sense of domination of one over another, and also abuse of the duties of care and confidence which may be imposed on one party towards another as a result of the particular relationship which emerges from the special circumstances of their association," and he quoted the words of Lord Eldon in *Huguenin* v. *Baseley* (1807) 14 Ves. 273 at p. 295, and the words of Lindley L.J. in *Allcard* v. *Skinner* (1887) 36 Ch.D. 145 at p. 181. He then went on to consider as a question of fact whether there was the necessary relationship of confidence between the plaintiff and the defendant in the present case for the plaintiff to succeed. He noted, as did Jenkins L.J., that the existence of the jurisdiction depends in each case on the particular facts, and is not circumscribed by reference to defined limits. He thought that just as there is an obligation of good faith between partners *inter se*, so there is if persons join together for the furtherance of some charitable or altruistic objective, and that in regard to all matters related to that objective each "necessarily reposes confidence" in the others.

But leaving aside that aspect of the matter, the learned Master of the Rolls also pointed out that the defendant was appointed to the committee in an advisory capacity, and (*per* Lord Chelmsford in *Tate* v. *Williamson* (1866) 2 Ch.App. 55 at p. 64), "placed himself in a position which rendered it incumbent upon him" to give the best advice to his colleagues in matters affecting their scheme. The defendant also was well aware of the plaintiff's sense of religious obligation to carry out the proposed scheme and he played upon it.

This jurisdiction to grant relief, which, as Jenkins L.J. emphasised, is not confined to cases of gifts (*Tate* v. *Williamson* (*supra*)), may be summed up in the words of Sir George Turner in *Billage* v. *Southee* (1852) 9 Hare 534 at p. 540, and adopted by Evershed M.R. in the present case: "The jurisdiction is founded on the principle of

correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied, whatever may be the nature of the confidence reposed, or the relationship of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustee and *cestui que trust*, guardian and ward," etc., " . . . to be merely instances of the application of the principle."

Ambit of power of court under Settled Land Act, 1925, *s.* 64, *and Trustee Act,* 1925, *s.* 57.—" . . . the legislature has by its language given clear indication that the court ought not to exercise its discretion in favour of a transaction or series of transactions which in its opinion are not of an administrative character, but involve a substantial rewriting of the trusts in order to rearrange beneficial interests to greater advantage." The above are the words of Roxburgh J. in *Re D.'s Settlement* [1952] 2 T.L.R. 483, referring to section 64 of the Settled Land Act, 1925, and he repeated the same words on the following day with regard to section 57 of the Trustee Act, 1925, in *Re B.'s Settlement* [1952] 2 T.L.R. 489. As the learned judge observed, surprisingly enough, there has been no detailed discussion of the ambit of these sections in a reported case during the 25 years they have been in force.

There was no administrative difficulty and no question of doubt arising under the settlements in both these cases, but in both a scheme had been devised to avoid estate duty, which, if it could be carried into effect with the consent of the court, would involve the saving of such a large sum that all parties interested would benefit. The schemes were elaborate and involved in both cases considerable alteration in the interests arising under the settlement. D.'s settlement was, of course, of land and capital money held in strict settlement, and B.'s settlement was one of pure personalty.

Roxburgh J. referred first to the extraordinary jurisdiction of the court to sanction unauthorised administrative transactions in an emergency as formulated in *Re New* [1901] 2 Ch. 534, and applied in *Re Tollemache* [1903] 1 Ch. 457. He found himself bound by these decisions which clearly did not cover the schemes under consideration, or permit any substitution of a new trust in place of the old one. The learned judge obviously thought there was some possibility that the old " extraordinary " jurisdiction had been superseded by section 64 and section 57.

Turning then to the wording of section 64 and section 57, he came to the conclusion that the rule in *Re New* (*supra*) had been altered only in that the jurisdiction was no longer extraordinary, and now covered transactions other than those of an emergency character. Neither section authorised a non-administrative transaction or gave power to execute a resettlement.

He held, therefore, that the proposed schemes fell outside the ambits of section 64 and section 57.

Contract for sale—bankruptcy of purchaser before completion—rescission.—"I am unable to agree that a vendor ought to be allowed to treat an act of bankruptcy before the date of completion as an anticipatory breach entitling him immediately to repudiate, or to wait for the day fixed for completion and then treat the contract as though time were of its essence, failure to complete on that day entitling the vendor to rescind." These are the words of Harman J. in *Jenning's Trustee* v. *King* [1952] 2 T.L.R. 469, on a point which has, rather surprisingly, not yet been directly covered by authority.

The defendant had agreed to sell certain property to a purchaser, who, between contract and the date fixed for completion, committed an act of bankruptcy. Soon after the date fixed for completion the defendant purported to rescind the contract. The purchaser was subsequently adjudicated bankrupt, and, the plaintiff being appointed trustee, he sued the defendant for damages for breach of contract.

The learned judge referred to the authorities and pointed out that the crucial difference between this case and *Powell* v. *Marshall, Parkes & Co., Ltd.* [1899] 1 Q.B. 710, was that in the latter case time was of the essence of the contract, the property there being licensed premises. The statement in Halsbury, Vol. 29, 2nd ed., pp. 358, 359, paras. 482 and 484, begs the question, and that in Williams on Vendor and Purchaser, 4th ed., Vol. I, at p. 584, is not borne out by the authority there cited, *Collins* v. *Stimson* (1883) 11 Q.B.D. 142.

The learned judge concluded by saying: "The legislature has made acts of bankruptcy available to creditors for three months, and it appears to me that the vendor must either await that period to see whether he can safely complete, or he must file a petition in bankruptcy if no other creditor takes that step in the interim"; he will then get someone with whom he can safely deal.

Joint tenancy—surrender.—Can one of two joint tenants, in the absence of authority from the other, or express words in the conveyance, surrender rights held jointly? This question was answered in the negative by the Court of Appeal in *Leek and Moorland's Building Society* v. *Clark* [1952] 2 T.L.R. 401.

The owners of a long leasehold interest in certain property occupied by two joint tenants (a husband and wife), sold their interest to the husband expressly subject to the existing tenancy. The husband then sold the property to a sub-purchaser, C., with vacant possession, but remained in the premises with his wife and paid rent to C. on a weekly basis. C. then mortgaged the property to the plaintiffs, who sought possession of the premises when the payments fell into arrear. The county court judge found that the wife had not known what was happening, or authorised anyone to put an end to her joint tenancy.

The Court of Appeal found that the sale to the husband did not terminate the tenancy, indeed, it was expressly provided that it should not do so. The question then arose as to whether the husband had effectively surrendered the joint tenancy by the conveyance to C.

Somervell L.J., who read the judgment of the court, distinguished *Doe* v. *Summersett* (1830) 1 B. & Ad. 135, on the ground that that was a case of a periodic tenancy where notice to quit was given by one joint landlord only, and in such a case the tenant holds only so long as all the landlords shall please. The court thought that the position would be the same in a periodic tenancy where there were joint lessees, but that it was different in the case of a lease with a right to determine before the full term has expired, and in the case of a surrender. He referred to *Re Viola's Indenture* [1909] 1 Ch. 244, and said: " . . . the lessees all have the right to a full term, and all must concur if this right is to be abandoned. . . . We would have thought it plain that one of two joint lessees cannot, in the absence of express words of authority, surrender rights held jointly. If property rights are held jointly prima facie a transfer must be by or under the authority of all interested."

Strict settlement—devise in common form—rule in Shelley's Case inapplicable.—In *Re William's Will Trusts* [1952] 2 T.L.R. 392, Roxburgh J. rejected the bold suggestion that the rule in *Shelley's Case* applied and still applies to all strict settlements made in common form and coming into effect before January 1, 1926.

The settlement in question was made by the will of a testator who died in 1921, and the material disposition was " to the use of my son W. during his life . . . with remainder to the use of his first and other sons successively according to seniority in tail male." W. claimed to be in possession, not as tenant for life, but as tenant in tail male under the rule in *Shelley's Case*.

The learned judge, having referred to the authorities and the practice of conveyancers, distinguished *Van Grutten* v. *Foxwell* [1897] A.C. 658, and relied upon *Goodtitle* v. *Herring* (1801) 1 East 263, as clear authority that in a devise in common form in strict settlement the sons of the propositus are intended to take and do take as purchasers. It was argued for W., applying two passages obiter of Lord Macnaghten and Lord Davey in *Van Grutten* v. *Foxwell* (*supra*) at pp. 668 and 685 respectively, that as the limitations to W.'s sons imported his whole male issue, the rule applied. But Roxburgh J. thought on reading the dicta in their contexts, that there was no such interpretation to be put upon them. In these common form limitations the words were given effect, not according to their ordinary legal sense, but according to the apparent intent of the testator to designate some individual person or particular class of persons.

Executor's joint account—cheques forged by one executor.—" The principle is that several cannot sue at law jointly unless each one is in a position to sue." These words of Crompton J. in *Brandon* v. *Scott* (1857) 7 El. & Bl. 234 at p. 237 were adopted by McNair J. in *Brewer* v. *Westminster Bank, Ltd.* [1952] 2 T.L.R. 568.

The learned judge decided that where A and B, two executors, open a joint bank account, all cheques requiring their joint signatures, the bank owes the executors a single obligation, and therefore A cannot recover from the bank money paid to B on a cheque on which B has forged A's signature. Whether B, who must be joined in the action, is joined as co-plaintiff or as defendant is purely a procedural matter and does not affect the issue. McNair J. said "If [A and B] had both been joined as plaintiffs, could they have obtained from the bank the declaration claimed, when an essential step in their proof was that the cheques were forged by B? In my judgment, they could not."

In view of this conclusion it was unnecessary for the learned judge to consider the matter further, but he made the following observations obiter:—

(1) A bank statement sent to only one executor does not bind the other who has not seen it or adopted it.

(2) There is no duty *vis-à-vis* the bank that one executor should act as watchdog over the other.

(3) By payment under B's forged cheque the bank had not obtained a good discharge against both A and B, any more than would have been the case had the bank paid against cheques signed by B only (*Stone* v. *Marsh* (1826) Ry. & Mood. 364).

This appears to be the first reported case on this point, and in view of its novelty and importance the learned judge gave leave to appeal under the Legal Aid and Advice Act, 1949.

(See also Conveyancer's Notebook.)

Sale of land by the court—auctioneer's remuneration.—Where property is sold by the court, and the sale is above the limit of the ordinary auctioneers' scale fee (£25,000), or, the sale being below that figure it is for some reason desired to challenge the auctioneers' right to full scale fees, the auctioneers have a right to attend the appointment with the master to fix their remuneration. If they are dissatisfied they should ask the master to adjourn the summons to the judge. If they are not given an opportunity of being heard or arguing about their remuneration, they should proceed by giving notice of motion to discharge the master's order, and not by summons to have their remuneration fixed. This was decided by Roxburgh J. in *Heller* v. *Wolfe* [1952] 2 T.L.R. 388.

The learned judge found it very difficult to fix the remuneration in this case, but he used the scale applicable to sales in bankruptcy as a guide, and fixed the remuneration at slightly less than the appropriate figure on that scale.

Transfer of local authorities' interests under National Health Service Act, 1946, *s.* 6 (2)—"*property . . . held solely for the purposes of the hospital.*"—*Ministry of Health* v. *Stafford Corporation* [1952] 1 All E.R. 744. (See under Charities.)

Mortgagor—tenancy not under statutory power—mortgagee's acquiescence.—In *Bradford Permanent Building Society* v. *Cholmondeley* (L.J. Newspaper, July 25, 1952, 407), before Harman J. on May 26, the learned judge held on the facts that there had been no acquiescence by the mortgagee to the mortgagor's letting of the mortgaged property not under statutory power. The mortgaged property was a rent-controlled house.

The learned judge said that acquiescence by the mortgagee does not mean mere standing by, but some encouragement to the tenant to change his position, as by taking rent from him. He referred to the words of Monroe J. in *Re O'Rourke's Estate* (1889) 23 L.R.Ir. 497 at p. 501, who points out that the mortgagor while in possession is at liberty to manage the land as he pleases, and it is not for the mortgagee to interfere unless and until he chooses to go into possession himself.

CORRIGENDUM

See p. 292, *ante*

Re Leigh's Marriage Settlement [1952] 1 T.L.R. 1463. The last part of paragraph 3 should be in the negative.

The learned judge emphasised that in that settlement the rule in *Whitby* v. *Mitchell* was mentioned only as a warning to the draftsman, and it was clearly *not* intended to prohibit absolutely the use of any limitation outside the rule when the power of appointment was exercised.

2. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

National Health Service—hospital premises and hospital activities —restrictive interpretation of legislation.—Ministry of Health v. *Stafford Corporation* [1952] 2 All E.R. 386; 2 T.L.R. 302. This case turned on the interpretation of section 6 (2) of the National Health Service Act, 1946, and on the interpretation of the Act generally. The section vested in the Ministry hospitals vested in local authorities. In the instant case the freehold of the premises was vested in the local authority but the actual operation of the hospital was conducted by a joint hospital board as tenant of the local authority. The Act referred somewhat indiscriminately to " premises " and activities of hospitals, the draftsman assuming that the owner of the site would also be conducting the hospital's activities. The Court of Appeal held that the defendants' freehold reversion did not vest in the Minister, since a doubt existed as to the scope of the transfer by

the statute. Romer L.J. concluded (p. 393): "It is to be borne in mind that the provisions of section 6 of this Act are of a confiscatory character, and the courts are not disposed to hold that a man—or, as here, a local authority, is dispossessed of his property without compensation in the absence of language which clearly leads to that conclusion."

(See also Conveyancer's Notebook.)

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Will—revocation—revival—Wills Act, 1837, *s.* 22—*In the Estate of Davis* [1952] 2 All E.R. 509; 2 T.L.R. 541. In this case a testator made a will in 1931 in favour of a woman whom he married shortly afterwards, the will being automatically revoked by the marriage, under the Wills Act, 1837, s. 18. He then wrote a note on the envelope containing his will, that this woman was now his wife, and this envelope was signed and attested with the due formalities of a codicil. Willmer J. held that the testator must have meant this envelope to operate as a codicil and that it was obviously meant to confirm his will. The will was therefore revived. Extrinsic evidence of intention would have been admissible but was not required in the circumstances.

(Theobald 50.)

Will—Formalities—Position of Signature—Wills Act, 1852, *s.* 1.—*Re Harris, Murray* v. *Everard* [1952] 2 All E.R. 409. The courts have been fairly liberal in recognising signatures on margins of wills but the signature which clearly precedes a will cannot, in view of the clear wording of the section, be effective. The rule laid down by the Court of Appeal in *Re Stalman* (1931) 145 L.T. 339 was followed, although the situation in the instant case was not quite the same as in any other case.

(Theobald 30.)

Will—certainty of condition—"permanent residence."—Re Gape [1952] 2 All E.R. 579; 2 T.L.R. 477. The Court of Appeal have now affirmed this decision and distinguished *Sifton* v. *Sifton* [1938] A.C. 656. Though "residence" may be too uncertain to supervise, "permanent residence" is considered to be adequately provable. It is similar to the test of domicile for various purposes. It involves a mental as well as a physical element, but this has never been a fatal

obstacle to proof. The state of a man's mind is a question of fact, as has so often been said. Lawyers will be more interested in the reason given by the learned Master of the Rolls (at p. 580): "I observe that the condition relates to residence and not, for example, to his marriage or religion. It is well established that the courts are always adverse to conditions which may affect the free choice of anyone in matters relating to marriage or to conscience. These considerations of public policy have obviously no application in the present case." This is important. The decision below appeared to imply a change in the trend which discourages such conditions. Though able to affirm that decision in the circumstances Sir Raymond Evershed confirms that the courts will continue to discourage them where liberal principles are violated.

(Theobald 436.)

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4. *PLANNING CASES*

By T. A. Blanco-White, Barrister-at-Law

Purchase notice—substitution of purchasing authorities—formalities.—Ealing Corporation v. *Minister of Housing, etc.* [1952] 2 T.L.R. 490; [1952] 2 All E.R. 59, is a somewhat unusual case about a purchase notice under section 19 of the Town and Country Planning Act, 1947. That the notice was good, and the landowner who served it entitled to demand that his land be bought, was not in dispute; indeed, the local authority on which the notice was served wanted to buy the land. The trouble was that the county council wanted to buy it too, and the Ministry favoured the county council. The Ministry can arrange for the land to be bought by any local authority they like, so long as they conform to the proper procedure of local public inquiry and carefully worded decision. In this case, however, they "tried to short-circuit the provisions of the section by holding one of those interminable informal conferences so beloved of civil servants," with the result that the purported decision in favour of the county council was void and the land went to the original local authority in default of any valid action—and that the *Ealing Corporation* now share with *Errington* [1935] 1 K.B. 249, and *Stafford* [1946] K.B. 621, the rare distinction of having caught the Ministry out.

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—claim for possession and damages for breach of covenant joined with claim for trespass—action brought in High Court—form of order—costs.—The facts in the case of *Tideway*

Investment and Property Holdings, Ltd. v. *Wellwood* [1952] 2 All E.R. 514, were dealt with in these Notes for May–June, 1952, at pp. 226–227, when the decision of Harman J. was noted. Subject to slight variations the Court of Appeal have affirmed Harman J.'s decision, and it is only necessary to mention one or two points. As regards the question of costs and the effect of section 17 (2) of the 1920 Rent Act, the Court of Appeal rejected the suggestion that the county court would not have had jurisdiction because the claims under the Rent Acts were joined with an unquantified claim in trespass. The claim in trespass was so trivial that it could not by any possibility have given rise to damages approximating to £200. It is to be noted that Sir Raymond Evershed M.R. doubted the correctness of the view expressed by Cohen L.J. in *Wolfe* v. *Clarkson* [1950] 2 All E.R. 529 at 532, that section 17 (2) of the 1920 Act has no application (*quoad* Rent Acts claims) where those claims are joined with another claim which itself is outside the county court jurisdiction. The point did not arise in the present case, since the court held that the trespass claim was within the county court jurisdiction. The court were satisfied that where a Rent Acts claim is joined with another claim within the county court jurisdiction section 17 (2) is not excluded.

Harman J. had stated in his order that he did not grant possession to the landlords, but he made the order subject to the condition that the tenants entered into certain obligations, and then went on to state that if they did not do so within a limited time an order for possession would go. As the Court of Appeal pointed out, the more usual form of order is an order for possession suspended so long as certain conditions continue to be satisfied. As, however, the order made by Harman J. did substantial justice the Court of Appeal did not disturb it on this ground. The court made it clear that the landlords were in no way precluded from bringing further proceedings for possession in the event of any relevant change of circumstances. Further, the court's order did not authorise or legalise the technical trespass committed by the tenants in running part of their installations along the balcony which was not included in the demise to them. It was, therefore, open to the landlords to bring further action for damages in respect of this continuing trespass, if they so desired, but no court would grant them an injunction, and they would be likely to get only nominal damages.

(Rent Restrictions Guide, 3rd ed., pp. 96, 133.)

Joint tenants—purported surrender of joint tenancy by one joint tenant.—In *Leek and Moorlands Building Society* v. *Clark* [1952] 2 T.L.R. 401, the facts were somewhat complicated, but the point decided was that one of two joint tenants (under a lease) cannot, without the authority of the other, surrender the joint rights. The court were asked to apply the principle in *Doe* v. *Summersett* (1830) 1 B. & Ad. 135, 140, that one of two joint *lessors* could put an end to a periodic tenancy without the concurrence of other, on the ground that the tenant holds so long as each and all of them shall please, so that, if one no longer pleases, the tenancy comes to an end. The

court thought that the same principle might apply in the case of joint *lessees* under a *periodic* tenancy. It seems fairly obvious that, in the case of a term certain with a right of renewal, both or all must join in requiring a renewal, and a periodic tenancy is analogous inasmuch as it renews itself unless either side bring it to an end. If, therefore, one of two joint lessees do not desire it to continue it is perhaps reasonable that he should be able to make this wish effective. This principle does not, however, apply to the surrender of a fixed term or to the bringing of it to an end before its natural expiry under a power to determine. In such cases both or all the joint tenants must concur: *cf. Re Viola's Indenture of Lease* [1909] 1 Ch. 244.

(Woodfall, 24th ed., pp. 60, 987.)

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6. *MISCELLANEOUS*

Matrimonial home—county court proceedings to evict daughters—application to restrain proceedings.—In *Murcutt* v. *Murcutt* [1952] 2 T.L.R. 274, a wife unsuccessfully sought to enlarge her rights as licensee in the matrimonial home. She had instituted divorce proceedings against her husband, and he had instituted proceedings in the county court to evict their two daughters, both of whom were of full age, and the two children of the elder daughter. The husband and wife both continued to reside in the house. The wife sought an injunction to restrain the husband from continuing with his action to which, the wife conceded, there was no answer in law. She argued that the effect of turning out the daughters would be to evict her as she would feel bound to go with them, especially as one daughter was "not very bright mentally." Williams J. pointed out that if the wife chose to follow the daughters that would be in consequence of the exercise of her own volition and not the result of the county court proceedings, and declined to grant the injunction.

or succession. It is designed for the student rather than the practitioner, but should prove useful to any lawyer who wishes to satisfy his mind as to the real basis of some form of equitable remedy or some equitable doctrine. The first part of the work is traditional in its arrangement, based on the various equitable maxims, though it is arguable that these maxims have no force as such and are merely mnemonic aids to the understanding of the binding rules. Throughout the book there is considerable reference to the history of each subject, a good point in an old yet far from sterile discipline. The full treatment of the disabilities of married women may strike an odd note, but is really a key to the work and the author's approach. Equity cannot ultimately be partitioned, like Poland, among more aggressive neighbours. The new equity is constantly developing and the lawyer cannot predict its development from his studies of patchworks of law and equity but only from substantive study of equity as a separate discipline. For this purpose many students may prefer the clear and candid, if incomplete, sections of *Keeton* to the impersonal authoritativeness of *Snell* or the breathless casuistry of *Hanbury*. The book is eminently readable, in spite of the complexity and subtlety of the subject.

The property lawyer will find useful material on the subject of powers of appointment, on specific performance of contracts of sale of land, on rectification and rescission, and on the effect of the statutory trust for sale. Professor Keeton maintains his view of the jurisdiction of the court to exercise a power in the nature of a trust, which many other lawyers now dismiss as an implied gift in default of appointment (pp. 195–6). On pp. 162–3 and 267 references to *Re Donkin* [1948] Ch. 74, and *Re Bradshaw* [1950] Ch. 78, might be added. On p. 267 some dicta from *Re Galway's Will Trusts* [1950] Ch. 1 might have been added, though the case itself is referred to on p. 261. These dicta sum up the effect of the modern cases on the doctrine of conversion by the statutory trusts. On p. 244 it should be noted by the reader that *Re Manners* [1949] Ch. 613, on the presumption of satisfaction of debts by legacies, has since been distinguished in *Re Haves* [1951] W.N. 550.

A. K. R. K.

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Of particular value are the Forms which are supplied to illustrate the text. The book contains a great many practical observations which will not be found in other works.

It is inevitable that a new work should contain a few printer's or proof-reader's errors, but so far as this reviewer's examination of the work goes these appear to be trifling. For example, the reader will readily appreciate the fact that where "the Vendor's obligations" in paragraph 7, at page 100 are referred to, the intention is to refer to the Purchaser's obligations as is clear from the context. At page 498 there is a similar error, where the concluding words of the form of covenant which is set out towards the foot of that page should state that the Purchaser shall observe and perform the restrictions, etc., and not, as appears in the text, that the Vendor shall observe and perform them.

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These are, however, microscopic points, and this reviewer has no hesitation in recommending the work most strongly to all who are concerned in conveyancing. Its chief merit is that it deals in a very practical way with most of the matters which arise in day to day conveyancing, and it will be of the very greatest assistance to young solicitors and clerks who are about to take posts as conveyancing managing clerks. Their employers will do well to see that they have it.

E. O. W.

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Although the editor has kept most controversial matter out of the main text, he has indicated points of difficulty in the footnotes and added copious references to legal journals, etc.; nor has he confined himself to the principal law reports. This has undoubtedly increased the value of the book to practitioners without, we think, adding to the articled clerks' burden. The treatments of planning and compulsory acquisition are excellent: they are clear and concise introductions which will be sufficient for the ordinary conveyancing practitioner who is only concerned with these subjects to a minor degree.

It appears to us that the part dealing with registered land is still weaker than the rest of the book. There are material differences between registered and unregistered land as regards registration of land charges, the effect of non-registration and the rights of persons in occupation; and the operation of a registered transfer is different from that of an unregistered conveyance. These points are not noticed with sufficient clarity, but it must in fairness be said that the Land Registration Act and Rules contain a number of obscurities, only some of which are dispelled by the practitioners' blunderings. The statement on p. 636 that boundaries must be clearly defined by fences, etc., before application for first registration is no longer correct. We would also mention two other matters for consideration when the next edition comes to be prepared: the section on misdescription and non-disclosure has always appeared to us to be rather less clear than it might be and the section on death duties might well be drastically curtailed.

Mr. Kersley has made a thoroughly good job of the new edition and there is no doubt that he has not merely maintained the high standard of the earlier editions but has surpassed it. In conclusion, is it too much to hope that one day a new edition of that very useful book, *Gibson's Statute Law*, in many ways a companion to *Gibson's Conveyancing*, may emerge from 27 Chancery Lane?

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We have heard *Burnett's Conveyancing* referred to as the little *Gibson*, but this is rather unfair. It is written by a member of the bar for bar students, who have probably never seen a land certificate, a conveyance or a completion statement; it is not a book for practitioners and cannot presuppose even a rough working knowledge of the subject. (In passing one may wonder at the temerity of the heading "Advising on Title" in chapter 8 if the person to be advised has been brought up on *Gibson*.) The success of *Burnett* within its own sphere is attested by the number of its editions. The new edition calls for little comment, but we must emphatically disagree with the author in his view that planning can be tossed in between leases and mortgages without any indication how it fits into the general scheme of conveyancing. The "points for special consideration on the purchase of land after the appointed day" do not indicate at what stage of a purchase they should be considered; and is a reader likely to be concerned with purchases before the appointed day? Like *Gibson* the weakest part of *Burnett* is registered land, which merits fuller treatment. The smaller format of the new edition makes it more attractive. For the rest, it seems to have maintained its own standard without any marked change.

E. F. G.

Compensation for the Compulsory Acquisition of Land. By A. W. Nicholls, M.A., B.Litt. London: Thames Bank Publishing Co., Ltd. xxvii and 447 pp. (£3 5s.)

This is a new selection of sections of such well-known statutes as the Lands Clauses (Consolidation) Act, 1845, and the Town and Country Planning Act, 1947, appropriate to the subject-matter, arranged logically and more than usually well annotated, with a good but short introduction. The book seems to be reasonably up to date (it is not precisely dated), but the learned author has not covered some points, such as the circumstances in which interest is payable on compensation money, and the special cases of "unfit houses" under the Fifth Schedule to the Town and Country Planning Act, 1944, and "well-maintained houses" under section 42 of the Housing Act, 1936. Minor points of this kind, however, may well be overlooked in view of the great care and industry that have obviously gone into the preparation of the author's notes; but this makes one wonder all the more forcibly whether it was really worth while to reproduce such a large mass of sections, most of which are well known and readily available in any law library, and to include an appendix running to some hundred pages or so of equally well-known statutory instruments, most of them made under the planning legislation. Surely a narrative account of the law, incorporating the author's valuable notes, would have been of more value to the profession, and could have been published at a lower price?

The book is well published and printed in a pleasing type; unfortunately, proof-reading does not seem to have been undertaken very thoroughly (we noticed, on a casual reading, slips on pp. 3, 8, 21, 43, 44 and 264—all, perhaps fortunately, in the text of the author's own comments), and the index should have been much fuller. Throughout the book case references are given to one series of reports only.

J. F. Garner.